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Nos. 514 and 530

In the Supreme Court of the United States

OCTOBER TERM, 1937

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

PAN AMERICAN PETROLEUM CORPORATION ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

HUMBLE OIL & REFINING COMPANY ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF ON BEHALF OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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v.

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v.
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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF ON BEHALF OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the specially constituted District Courts (R. 160) is reported in *Pan American Petroleum Corporation* v. *United States et al., and eight other cases* (consolidated for hearing), 18 F. Supp. 711.

The general report of the Commission (R. 13), announcing certain governing principles, is reported in *Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues Or Expenses, Part II, Terminal Services,* 209 I. C. C. 11. The supplemental reports, in connection with which were entered the orders involved in the consolidated cases, are reported in *Mexican Petroleum Corporation of La. Inc.*[1] *Terminal Allowance,* 209 I. C. C. 394 (R. 52); *Celotex Company Terminal Allowance,* 209 I. C. C. 764 (R. 70); *Great Southern Lumber Company—Bogalusa Paper Company Terminal Allowance,* 209 I. C. C. 793 (R. 90); *Standard Oil Company of Louisiana Terminal Allowance,* 209 I. C. C. 68 (R. 107); *Humble Oil & Refining Co. Terminal Allowance,* 209 I. C. C. 727 (R. 543); *Magnolia Petroleum Company Terminal Allowance,* 209 I. C. C. 93 (R. 574); *Texas Company Terminal Allowance at Houston, Tex.,* 209 I. C. C. 767 (R. 605); *Gulf Refining Company Terminal Allowance,* 209 I. C. C. 757 (R. 641); *Texas Company Terminal Allowance at Port Arthur, Texas,* 44th Supplemental Report (R. 665).

[1] Pan American Petroleum Corporation is successor to the Mexican Petroleum Corporation of Louisiana Incorporated, in ownership and operation of Destrehan refinery.

JURISDICTION

The final decrees of the District Court, E. D. Louisiana, were entered April 28, 1937 (R. 167–170). Petition for appeal was filed June 18, 1937 (R. 512), and allowed the same day (R. 513). The final decrees of the District Court, S. D. Texas, were entered May 1, 1937, (R. 683). Petition for appeal was filed June 19, 1937 (R. 686), and allowed the same day (R. 690). The defendant railroad companies in the respective cases did not join in the appeals and, as to each of them, summons and severance was filed (R. 517–522; 563; 564; 624–628; 684–685). The jurisdiction of this court is founded upon the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 203, 219, 220 (U. S. C., Title 28, Secs. 45 and 47a, Supp. III), and Section 283 of the Judicial Code, as amended by Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345). Probable jurisdiction found November 15, 1937.

QUESTIONS

Following a general investigation by the Commission into the practices of railroads (sometimes followed and sometimes not) of performing, as under the line-haul rate, the "spotting" of cars within industrial plants, or of paying allowances to industries doing the "spotting" with their own locomotives, the Commission issued a main report in which it announced the general "principles" as to operating circumstances and conditions within a plant to be ap-

plied in determining whether reasonable delivery, or receipt, of cars under the line-haul rates covers "spotting" service within the plant. Supplemental reports have been issued relating to the situations at particular plants, including the supplemental reports, here involved, which deal specifically with the circumstances and conditions shown of record to exist at the plants of the appellees in these cases. Cars consigned to or by appellees are delivered to and received from them by the railroads at interchange or "storage" tracks located upon or at the entrance to appellees' plants. With their own locomotives, appellees "spot" the cars between the interchange tracks and particular unloading and loading points *when and as needed* by their industrial operations and under other circumstances later to be described; and they are paid allowances for such "spotting" by the railroads. Based upon underlying findings as to circumstances and conditions at the several plants the Commission found substantially in all cases that the interchange tracks constitute reasonably convenient points for delivery or receipt of cars; that the industries perform no service beyond those points of interchange for which the railroads are compensated in their line-haul rates; and that it results that the railroads, by payment of the allowances provide appellees with a preferential service not accorded to shippers generally, and refund a portion of the rates in violation of section 6 (7). Orders were entered in each case directing the railroad or railroads to cease

and desist from the practices. The ultimate question is whether the lower courts erred in holding that the Commission's orders were invalid. Subordinate questions bearing on the validity of the orders are:[2]

1. Whether the Commission exceeded its statutory authority.

2. Whether it made the necessary findings of fact.

3. Whether its findings and orders were supported by substantial evidence.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix.

STATEMENT

This is a direct appeal by the United States and the Interstate Commerce Commission from final decrees of the United States District Court for the Eastern District of Louisiana and of the United States District Court for the Southern District of Texas, permanently enjoining and setting aside the orders of the Commission above described. The cases were heard together, on one record, on the

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[2] The decision and decrees of the lower courts were rendered and entered prior to the decisions of this court in *U. S. et al.* v. *American Sheet & Tin Plate Co. et al.* (*Pittsburgh Allowance Cases*) 301 U. S. 402, and in *Goodman Lumber Co.* v. *U. S. et al.*, and *A. O. Smith Corporation* v. *U. S. et al.*, 301 U. S. 669, in which orders of the Commission were upheld, based upon identical statutory authority, upon the same general record and main report (209 I. C. C. 11) coupled, as here, with supplemental reports pertaining to the circumstances and conditions at the particular plants.

merits by the same court of three judges and were disposed of in one opinion (R. 160).

Appellees all operate manufacturing plants which are respectively located as follows: Pan American Petroleum Corporation, Destrehan, La.; Colin C. Bell and Wm. Tracy Alden, trustees for the Celotex Company, Marrero, La.; Great Southern Lumber Company and Bogalusa Paper Company, Bogalusa, La.; Standard Oil Company of Louisiana, North Baton Rouge, La.; Humble Oil & Refining Company, Baytown, Tex.; Magnolia Petroleum Company, Chaison, Tex.; Texas Company, Houston, Tex.; Gulf Refining Company, Port Arthur, Tex.; Texas Company, Port Arthur, Tex. The railroads serving these plants will be shown in subsequent chapters of this brief describing separately the circumstances and conditions of operation at and within each of the plants.

THE COMMISSION PROCEEDING.

The Commission proceeding, *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, in which the nine orders in controversy were issued, is Part II of an investigation instituted July 6, 1931, upon the Commission's own motion "into practices of carriers affecting operating revenues or expenses" which for convenience was divided into different parts. The Commission's investigation was undertaken under section 13 (2) of the Act, which, *inter alia*, empowers the Commission to institute proceedings on its own motion as to any matters con-

cerning which a complaint is authorized, "or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act." Section 12 (1) of the Act authorizes the Commission to inquire into the management of the business of the carriers, imposes upon it the duty to keep itself informed as to the manner and method in which the same is conducted, and provides that "the Commission is hereby authorized and required to execute and enforce the provisions of this Act." Part II of the proceeding related to the "spotting" of cars at industries, the Commission's "main" report (R. 13) specifying the matters covered as follows (R. 17–18):

> "Our inquiry first extended to various phases of terminal services including those covered herein and the practices of respondent carriers in connection therewith. No industries were heard. Thereafter further hearings were had at which industries were invited to be present and advised of the information to be sought at such further hearings. The principal questions to be determined, as indicated in the later notices, are as follows:
>
> 1. Whether such terminal services, in whole or in part—performed in placing cars at designated locations in positions accessible for loading and unloading—are services which the connecting common carriers, by operation of law, are duty-bound to perform. This

question relates to three distinct methods of rendering such services, including:

Group A, where the industries perform these services and receive compensation therefor from respondent carriers.

Group B, where the industries perform the services and themselves bear the expense without compensation from respondent carriers, and

Group C, where respondent carriers perform the services at the special convenience of the industries.

2. Whether, in circumstances where such services are performed by the industries, any allowances made to the industries by connecting common carriers as compensation for such services, are lawful; also why, in similar circumstances, no allowances are made to other industries for performing such services.

Hearings were held at practically all the larger cities of the country, a record of about 18,000 pages of testimony and more than 500 exhibits being made. During the course of the hearings testimony and evidence describing and relating to the service of so-called "spotting" of cars involved on the tracks of particular plants was taken, including those of appellees herein, which enabled the Commission to reach determinations and deal by supplemental reports with the practices of the carriers at particular industries or plants.

The Commission's orders, involved in the respective suits, are to be read together with the reports which are made parts thereof. *Am. Exp. Co.* v. *Caldwell*, 244 U. S. 617, 627; *Georgia Comm.* v. *United States*, 283 U. S. 765, 771.

After concluding the hearings the Commission, on May 14, 1935, issued its first or "main" report (R. 13), in which it discussed generally the historical and legal aspects of "spotting" service and reviewed and discussed generally the facts disclosed in the record before it. Describing that service the report reads, in part (R. 18):

> The service rendered in placing cars on and removing them from team tracks and private sidings is well known. It consists of the placing of cars at or their removal from a point on such tracks reasonably convenient to both the carrier and the shipper. A description of the service involved on tracks of individual industrial plants will be dealt with in subsequent reports, but in general it may be stated as follows: The industries heard on this record have systems of tracks within their plants which vary in extent from a few tracks aggregating only a few hundred feet in length, to extensive systems many miles in length. These industries are served in one of two ways, i. e., inbound and outbound cars are delivered or received by the carriers on interchange tracks which either compose an extensive yard or designated tracks from and to which interchange track the spotting service is performed

by locomotives belonging to the industry served; for which service in many instances the industry receives an allowance from the carrier while in other instances such service is performed by the industry at its own expense; or by the other method the spotting service is performed by the carrier. In the majority of such instances the spotting is performed by the carrier at its convenience and without interruption or interference by the industry. In other instances cars are first placed by the carrier on interchange tracks from which they are subsequently moved by a carrier engine or engines assigned to the plant and operating entirely under the direction of the industry and spotted when and as needed by the industry without charge in addition to the line-haul rate or switching charge otherwise applicable. At the latter group of industries the services are substantially the same as at the industries where the spotting service is performed by plant power. This report will principally deal with the class of industries to which an allowance is paid by the carrier as compensation for rendering service which it is urged is within the obligation of the carrier under the line-haul rate, and those to which the carriers assign power to perform the spotting service. * * *

Numerous other industries heard on this record use locomotives for the identical purposes and in the same manner, but receive no allowance therefor, * * *

> The published tariffs generally establish switching limits at the various destination points. Delivery within those limits is paid for when rates are collected to those destinations. In some cases the switching limits are definitely defined by boundaries, and at others the industries included within the switching district are named. There is no dispute that delivery at the various industries is covered by the published rate. The difficult thing is to ascertain when delivery at the plant is made. In the nature of things no inflexible formula can furnish a solution for that problem. The limitation of place within which delivery is due will vary with varying conditions. All that we can safely say is that there must be such a delivery as is customary and reasonable. * * *
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> * * * * *
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> The tariffs publishing the line-haul and switching charges constituting the carrier's holding out to all alike of service under such rates and charges do not in terms or by any reasonable construction provide for "plant switching" or "spotting of cars at unloading point" to be performed at plant's convenience.

The payment of allowances by railroads to industries for performing "spotting" within their plants appears to have started in the eastern industrial sections and the instances thereof gradually became more numerous in that part of the country until about 1915. Their spread in Pennsylvania and Ohio was more rapid after the end of federal control

of the railroads. In 1921, the first important allowance was granted in the Illinois-Indiana industrial region, and others rapidly followed[3] extending into the part of the Mississippi Valley west of the river. Some allowances have been granted in the north-central and extreme northwest sections and at present the only sections of the country where allowances are not paid are New England, the Southeast and the extreme Southwest.[4] While the practice of granting allowances is more prevalent in the eastern industrial sections than elsewhere, the carriers in those sections by no means grant allowances to, or perform "spotting" for, all industrial plants served by them. This is shown by exhibits introduced by the carriers. As for the particular territory here involved, the allowance granted in 1923 to the Magnolia Company, one of the appellees in these cases, was apparently the first to an oil company in that section of the country. The competively induced spread of the practice, once it had been started by a single railroad, is described in the *Magnolia Allowance Case*, 209 I. C. C. 93, 95–98 (R. 574). The Standard Oil Company of Louisiana,

[3] 209 I. C. C. 11, 37 (R. 36).

[4] Main Report, 209 I. C. C. 11, 33, 34. (R. 36) Or. Tr., Vol. II, p. 11315; Vol. 9, p. 9477; Vol. II, p. 11349; Vol. 7, ex. C–22; Vol. 8, p. 8035; Vol. 7, p. 7137; Vol. 3 of exhs. ex–A–48, p. 155; Vol. 4 of exhs. ex–C–22, p. 297. Or. Tr., has reference to the original printed record of the Commission proceeding, introduced as an exhibit in the lower court, and brought here by stipulation of counsel. (R. 691; 511.)

commencing operations in 1910, did its own spotting at its own expense until 1927 when it was granted an allowance. The history leading up to the granting of that alllowance is given in the *Standard Oil Allowance Case*, 209 I. C. C. 68, 70, 71 (R. 107). Furthermore, rules promulgated by the Traffic Executive Association, eastern territory (Appendix A, Commission's "main" report, R. 50) [5] to govern the granting and computation of "plant facility allowances" show recognition of decided limitations upon the carriers' obligations to perform "plant spotting" under the line-haul rate, or to assume the costs thereof. These rules are discussed in the Commission's "main" report (R. 37). Moreover, the opening paragraph of the rules states that (R. 48): "In view of the conditions under which plant facility allowances have developed it was the concensus that such allowances should be limited to iron and steel industries. * * *"

The allowances paid by the railroads to the particular industries receiving them are published in tariffs in the nature of exceptions to the line-haul rate tariff, the assumption being that the "plant spotting" is transportation service under the line-haul rate, for performance of which the industries are entitled to compensation under section 15 (13) of the Interstate Commerce Act.

Transportation Act, 1920, made important changes in the Interstate Commerce Act. There was, of

[5] Or. Tr., Vol. I of Exh's., Ex. 106, p. 297; Western Trunk Line Territory, Vol. II of Exh's., Ex. 264, p. 251.

course, no change made in the Act's principal purpose, which, from the beginning had been (and still remains) "to cut up by the roots every form of discrimination, favoritism and inequality." *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467, 478. But the 1920 Act sought also to ensure an adequate and efficient national transportation service. This was to be accomplished in part by direct instructions to the Commission to fix rates that would "as nearly as may be" yield adequate revenue and a fair return to the carriers. (Sec. 15a (2).)[6] However, the desired result of an efficient national transportation service at rates, both just to carriers and reasonable to shippers, could not be obtained simply by raising rates and, accordingly the new regulatory policy was in large measure directed to the prevention of waste, principally waste of a kind growing out of the carriers' competition with each other. *Transit Commission* v. *U. S.*, 289 U. S. 121, 127, 128. In *Texas* v. *United States*, 292 U. S. 522, 530, 531, it is em-

[6] The General Rate Increase cases of the Commission are well known. *Increased Rates, 1920*, 58 I. C. C. 220 (increases ranging from 25 to 40 p. c.); *Reduced Rates, 1922*, 68 I. C. C. 676 (partial reduction of about 10 p. c.); *Ex Parte 103, Fifteen Per Cent Case*, 178 I. C. C. 539 (temporary increase on many selected commodities); *Emergency Freight Charges, 1935*, 208 I. C. C. 4 (emergency increase for temporary period ending June 30, 1936, and subsequently extended to December 31, 1936, 215 I. C. C. 439). *Ex Parte 115, In the Matter of Increases in Freight Rates*, 223 I. C. C. 657 (increases on some heavy basic commodities). Pending *Ex Parte 123, Fifteen Per Cent Case, 1937*.

phasized that the provisions of Emergency Railroad Act, 1933—

> Confirm and carry forward the purpose which led to the enactment of Transportation Act, 1920. * * * It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public. *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, 317; *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 277. * * *

The Commission's investigation in Ex Parte 104 into practices adversely affecting operating revenues is in the nature of a companion case to *Ex Parte 103, Fifteen Per Cent Case, 1931*, *supra*, and is there referred to (pp. 585, 586). Under the conditions described by the Commission in these cases "plant spotting" is unmistakably no part of the railroads' work under the rates. What the Commission condemns in these cases is payments made by the railroads of money to appellee industries for doing their own work. The general run of shippers enjoy no such "shrinking" of the rates they must pay, but, on the contrary, have been asked to bear the load of general increases while such refunds from the rates were being continued to many particular industries.

The Commission entered no general order with its main report, but its report announced the general principles as to operating circumstances and conditions within a plant to be applied in determining

whether reasonable delivery, or receipt, of cars under the line-haul rate covers "spotting" service within the plant. The standard laid down is what has long been termed the "equivalent of team track, or simple switching, delivery," but it should be noted that the Commission defines or specifies service that is to be regarded as in excess thereof, the text of its report reading (R. 46):

> When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, as set forth more specifically in rules 8, 9, and 10 of Appendix A, the service beyond the point of interruption or interference is in excess of that performed in simple switching or team track delivery. * * *

Following its main report, the Commission issued supplemental reports with respect to the situation at particular plants, including the above-named supplemental reports involved herein. Later chapters of this brief will discuss separately each of the supplemental reports and supporting evidence involved in the respective cases. For present purposes of factual background a very general statement will be given. The extent of the plant tracks of the several appellees varies, for example, from 3.5 miles of track

within the plant of the Pan American Company to 10 miles, 12 miles, and 18.5 miles of track[7] within the plants of the Magnolia Petroleum Company, the Texas Company and Standard Oil Company, respectively, the latter being the largest plant of its kind in the world. The railroads serving appellees' plants make delivery of cars upon, and receive them from, so-called interchange or hold tracks located at the plants. All of the appellees perform, with their own locomotives and crews, the necessary plant movements to "spot" the cars at the various desired unloading points, to place "empties" at the desired loading points and, after loading, to return them to the interchange tracks, all of this being done, of course, as best conforming to plant needs and other use of plant track. Eight[8] of the appellees had been (and some for many years) performing their own "plant spotting" at their own expense at the times when the railroads were induced, or agreed, to grant them allowances.

Particularizing briefly with respect to the Pan American Petroleum Corporation, successor to the

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[7] Appellee, Great Southern Lumber Co.-Bogalusa Paper Co., has 22 miles of plant track, including track to two small factories in the same industrial area. The rail is too light (56 pound) to permit of safe operation by the switching locomotives of the New Orleans & Great Northern used at Bogalusa.

[8] The ninth, appellee Celotex Company, enlarged its plant in 1926 and at that time took over the performance of spotting service, therefore done by the Texas & New Orleans Railroad.

Mexican Petroleum Corporation and appellee in the first named suit: Its plant, built in 1914 and 1915, contains, as above said, about 3.5 miles of plant track laid with light 60 pound and 75 pound rails. Its switching work, both "spotting" and intraplant, was done by the industry until 1926 with a gasoline locomotive, at which time a 40-ton saddle tank oil burning locomotive was substituted. For short periods it has used somewhat heavier locomotives rented from the railroad. Because of the fire hazards within the refinery the rented locomotives had to be equipped with special spark arresters, which would also be true if the railroad itself were to undertake the work with its switching locomotives [9] (R. 53–54). Under normal business conditions the plant locomotive is operated from 14 to 16 hours daily in spotting service and must be available at all times for a "constant or stand-by service" (R. 53). At some loading points more than one commodity may be loaded, since the use of pipes makes it unnecessary for a car to be directly opposite the track. As soon as the cars are loaded they are immediately pulled out and replaced by others (R. 54). As testified by the plant's superintendent (R. 251):

> "After the cars have been spotted on tracks A, B, C and D it takes about 20 to 25 minutes to load those cars. These cars are immediately pulled out and others spotted. That is

[9] It would seem that the spotting of cars within a refinery area with switching engines, even though equipped with special spark arresters, would still entail fire hazards.

practically a continuous operation. That is true at all our loading spots, so that we would need an engine there practically all the time the plant is in operation.

In order for the Illinois Central to render as efficient service as we can with our own power it would be necessary for them to keep an engine there all the time working under our direction, so that there would be no delay in our industrial operations. It would have to meet the convenience of the industry."

The testimony of the railroad's witness is to the same effect, namely, that (R. 251):

> "The Pan American plant at Destrehan has its own engine which is available at all times, and if the Illinois Central were to undertake to give that plant the same service as is now performed by the industry it would have to provide the industry with standby service."

The Commission's report states (R. 54) that the spotting service must be conducted in such manner as to provide an adequate supply of cars at such times as will meet the industrial needs, but respondent has never been requested to perform the service. If respondent were required to perform this service it would be necessary for it to assign a locomotive for exclusive use within the plant. In 1926 the industry began negotiations for an allowance and in 1928 an allowance of 90 cents per loaded car was granted. The Commission's report concludes (R. 54):

> "We find that the interchange tracks at this plant are reasonably convenient points

for the delivery and receipt of interstate shipments of carload freight; that the Mexican Corporation performs no service beyond such points of interchange for which the respondent carrier is compensated in its interstate line-haul rates; and that by the payment of an allowance respondent carrier provides the means by which the industry enjoys a preferential service not accorded to shippers generally and refunds or remits a portion of the rates or charges collected or received as compensation for the interstate transportation of property, in violation of section 6 (6) of the Interstate Commerce Act."

The orders entered in the nine cases are similar, and the following one is typical (R. 55):

> "Upon further consideration of the record in this proceeding concerning the lawfulness and propriety of the allowance paid by The Yazoo and Mississippi Valley Railroad Company to the Mexican Petroleum Corporation of Louisiana, Incorporated, for performance by the latter of spotting service within its plant at Destrehan, La., and the Commission having under date of May 14, 1934, made and filed a report *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, containing its legal conclusions with respect to the general situation presented, and the division having on the date hereof made and filed a supplemental report containing its findings of fact and conclusions with respect to the allowance paid to the Mexican Petroleum Corporation of Louisiana, Incorporated, which reports are

hereby referred to and made a part hereof, and the division having found in said supplemental report that by the payment of said allowance The Yazoo and Mississippi Valley Railroad Company violates the Interstate Commerce Act as set forth in the abovementioned reports:

It is ordered, That The Yazoo and Mississippi Valley Railroad Company, be, and it is hereby, notified and required to cease and desist on or before August 22, 1935, and thereafter to abstain from such unlawful practice."

PROCEEDINGS IN THE COURTS BELOW

United States District Court, E. D. Louisiana: July 8, 1935, the bill of complaint was filed in cause numbered 331, and July 12, 1935, an interlocutory injunction was entered restraining enforcement of the Commission's order involved in said cause. (R. 148.) August 9, 1935, the bills of complaint were filed in causes numbered 314, 315, and 317, and August 19, 1935, interlocutory injunctions were entered restraining enforcement of the Commission's orders involved in said causes. (R. 149–153.) *United States District Court, S. D. Texas:* August 9, 1935, the bills of complaint were filed in causes numbered 690, 691, 692, 693, and August 19, 1935, interlocutory injunctions were entered restraining enforcement of the Commission's orders involved in said causes. (R. 550; 583; 612; 648; 678.) January 30, 1936, all eight causes were consolidated for hearing

before Circuit Judge Foster and District Judges Borah and Kennerly, sitting as special constituted courts for the United States District Court, E. D. Louisiana, and for the United States District Court, S. D. Texas; and said causes were orally argued by counsel for the plaintiffs and by counsel for the defendants United States and Interstate Commerce Commission. February 11, 1936, the bill of complaint was filed in cause numbered 718, and March 3, 1936, an interlocutory injunction was entered restraining enforcement of the Commission's order involved in said cause. (R. 678.) Pursuant to stipulation of the parties and order of the court this cause was consolidated for final determination with said other causes (R. 679). The consolidated causes were submitted upon the bills of complaint, to each of which was attached the Commission's main report and its supplemental report involved in the particular cause, upon the answers of the defendants, and upon a certified copy of the record made before the Commission. February 24, 1937, the court rendered a single opinion, holding that the Commission's orders in all of the causes were invalid. (R. 160.) April 28, 1937, the District Court, E. D. Louisiana, filed its Findings of Fact and Conclusions of Law (R. 171), and on the same day entered final decrees permanently enjoining the Commission's orders, involved in the causes before that court (R. 167–170). May 1, 1937, the District Court, S. D. Texas, filed its Findings of Fact and Conclusions of Law (R. 559), and on the

same day entered final decrees permanently enjoining the Commission's orders, involved in the causes before that court. (R. 563; 590; 623; 656; 683.)

SPECIFICATIONS OF ERRORS

The following errors of the District Court are urged herein.

The District Court erred:

1. In entering the decrees enjoining, setting aside, and annulling the orders of the Interstate Commerce Commission.

2. In holding that the switching and "spotting" of cars within the respective industrial plants of the plaintiffs is "transportation" within the meaning of the Interstate Commerce Act, subdivisions (3), (4), and (6) of Section 1 of said Act.

3. In holding as follows: "There is no evidence that such railroads are prohibited by the plaintiffs from performing such service, nor that there are physical conditions which prevent them from doing so. Indeed, there appears to be no 'abnormal conditions' of any kind which would serve to relieve the railroads involved of the duty."

4. In holding that "Having the duty to perform the service, the railroads involved properly and lawfully contracted with the respective plaintiffs to perform it, and properly and lawfully made such plaintiffs allowances therefor in their tariffs."

5. In holding that in these cases, and under the evidence therein, "The Commission was without power to wholly prohibit such allowances."

6. In holding that the Commission's orders in these cases are not based on sufficient findings necessary to support them nor do such findings appear in the reports which are made a part of the orders.

7. In granting the injunctions sought in all cases.

8. In failing and refusing to hold that the Commission's orders in these cases are within the power conferred upon it by the Interstate Commerce Act.

9. In failing and refusing to hold that the findings made by the Commission in each of these cases are sufficient to support the respective orders.

10. In failing and refusing to hold that each of the orders in these cases is supported by substantial evidence.

11. In failing and refusing to dismiss the petition in each of these cases for want of equity.

12. In failing and refusing to find and hold that the "spotting" of cars within the industrial plants of the plaintiffs in these cases is not "transportation" for which the carriers are compensated under their line haul rates.

13. In failing and refusing to hold that the "spotting" of cars within the industrial plants of the plaintiffs is a private or plant service which the respective railroads may not lawfully perform or pay plaintiffs for performing under their line-haul rates or without charge in addition to said rates.

14. In failing and refusing to find that no custom or practice, long continued or otherwise, exists

among plaintiffs and the railroads which serve their plants or among carriers and shippers generally, of including and performing or paying for "spotting" of cars within industrial plants as part of the service for which railroads are compensated by their line-haul freight rates.

15. In failing and refusing to give and accord proper legal force and effect to the evidence of record in these cases.

16. In failing and refusing to consider separately and to give proper legal effect to the particular evidence showing the actual physical and other circumstances and conditions under which the "spotting" services are performed at the particular plants of the respective plaintiffs, and in assuming that the facts and circumstances concerning the nature of the "spotting" service and the conditions of its performance are the same at each of the plants of the five plaintiffs.

SUMMARY OF THE ARGUMENT

I. The orders in these cases, requiring the specified railroads to cease the granting of allowances to appellees for performing their own "plant spotting," were within the Commission's authority under the Interstate Commerce Act. Payment of allowances to shippers is lawful only when supported by a consideration. *New York Central & H. R. Co.* v. *General Electric Co.*, 114 N. E. 115, 117 (cert. den. 243 U. S. 636); *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501. In these cases the Commission has

found and determined, after hearing and upon evidence, that the interchange tracks of the respective industries are reasonably convenient points for the receipt and delivery of interstate shipments and that the industry performs no service beyond those points of interchange for which the carrier is compensated in its line-haul rates, and that, accordingly, the allowances provide the means by which appellees receive preferential service not accorded to shippers generally, and constitute unlawful refunds of a portion of the rates.

"The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service." *United States* v. *Am. Tin Plate Co.* (*Pittsburgh Allowance Cases*), 301 U. S. 402, 408; *Los Angeles Switching Case*, 234 U. S. 294, 311; *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 508. And since the Commission has made findings which are an adjudication "that the spotting service within the appellee's plants is not transportation service which the carriers are bound to render in respect of receipt and delivery of freight" there is power to enjoin "the making, of an allowance to the industry which performs it." *Pittsburgh Allowance Cases, supra*, pp. 407, 408.

1. "There is no custom or practice which has the force of a rule of law that the line-haul rate includes plant spotting service." *Pittsburgh Allowance Cases, supra*, p. 410. And this is true whatever the terri-

tory and whether at iron and steel plants, glass plants, oil refineries, lumber and paper plants, composition board or other plants. What was dealt with in the Pittsburgh Cases in the matter of alleged custom was what was presented to the Court, namely, the asserted uniform custom of American carriers to include plants' spotting service in their line-haul rates; and what was held was that there was no such custom (p. 410). Moreover, even confining consideration to the region here involved, the evidence shows the same lack of uniformity as obtains throughout the country.

Furthermore, in the *Pittsburgh Cases, supra*, this Court, in answer to the contention that the Commission had, by past decisions, sanctioned the practice of granting plant spotting allowances, said: "We cannot agree either that the Commission has so decided or that if it had it would be concluded from reexamining the question in the light of existing conditions"; (p. 407); that "whatever may have been decided in the past, it is evident that the growth of the practice of making allowances for plant switching and the lack of uniformity of the practice of the carriers with respect to this service properly called for an investigation of the entire situation * * *" (p. 408).

II. The findings made by the Commission in each case are sufficient to support the respective orders. The supplemental report in each case finds and sets forth all pertinent facts concerning the physical

plan and arrangement of the particular plant, the plant tracks, the railroad tracks and spurs, and the circumstances and conditions under which the spotting service is and must be performed. From these facts the Commission finds substantially in all cases that the interchange tracks constitute reasonably convenient points for delivery or receipt of shipments; that the industries perform no service beyond for which the carriers are compensated in their line-haul rates; that accordingly the carriers may not lawfully pay allowances to appellees for performing it; and that the allowances provide the means whereby appellees enjoy preferential service not accorded shippers generally, and constitute refunds in violation of Section 6 of the Act. These findings meet the requirements of the Act. *Pittsburgh Allowance Cases, supra.*

III. The orders are supported by substantial evidence. The evidence abundantly establishes all of the facts found and recited in the supplemental reports; it furnishes a precise description of appellees' plants; it fully describes the work of the railroads in delivering and receiving cars upon the interchange tracks and the "spotting" service performed at each of the plants; it shows the conditions under which the spotting service is and must be performed because of the nature and requirements of appellees' manufacturing operations, and it describes the physical and other obstacles and conditions within the plants which prevent the carriers from performing the

service at all, or at their own reasonable convenience. Appellees' contention really is that the Commission drew improper conclusions from the evidence which the record does contain, and not that the evidence contains insufficient facts to justify the Commission in reaching its conclusions. The evidence in these cases is of similar type and probative effect to that held sufficient to support the orders in *Pittsburgh Allowance Cases, supra*, in *Merchants Warehouse Co.* v. *United States, supra*, and *L. & N. R. R. Co.* v. *United States*, 282 U. S. 740, 757–758, and is clearly sufficient to support the orders under the rule laid down by this Court in *Los Angeles Switching Case, supra*, where it said that (p. 311) questions of the type here involved are "to be determined according to the actual conditions of operation."

ARGUMENT.

I.

The orders issued by the Commission in these cases, requiring the specified railroads to cease the payment of allowances to appellees for performing their own "plant spotting", were within its authority under the Interstate Commerce Act.

Payment of allowances by the railroads to shippers is "lawful only when supported by a consideration." *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247, 263; *N. Y. Cent. & H. R. R. R. Co.* v. *General Elec. Co.*, 114 N. E. 115, 117. In the present cases the only assumption that could support the allowances out of the rates is that the railroads' transportation

obligations include, not only the delivery of cars to, and the taking them from, interchange tracks at the plants, but also the duty to place locomotives and crews under the direction and control of the industries; the locomotives specially equipped to minimize fire hazards or of special kind suited to the plant's layout or trackage, and with the crews working to spot the cars between interchange tracks and points desired within the plant, at times desired, and as otherwise conforming to the convenience of the plants and other use of plant track. Under these circumstances and others confronting the carriers, the Commission found substantially in each case that the interchange tracks at the plants constituted reasonably convenient points for the receipt and delivery of interstate shipments; that the industry performed no service beyond those points of interchange for which the carriers were compensated in their line-haul rates; and that, accordingly, the allowances provided the means whereby the industry enjoyed a preferential service not accorded to shippers generally and constituted a refund or remission of a portion of the rates for transportation in violation of section 6 (7) of the Interstate Commerce Act.

The lower court's decision is to the contrary, that is, that the "plant spotting" at the industries involved is a duty of the railroads, supplying the consideration for contracts for its performance by the industries under the allowance tariffs. The court said, in substance, that the first question was whether

the spotting, for which the industries were made an allowance under the tariffs, was a service which the railroads were required to perform as a part of transportation. Answering this question, the court's decision reads (R. 166):

> "We think that under the evidence the question must be affirmatively answered. We think it clear that the railroads involved are required, under the Law, to perform such service as a part of transportation. Subdivisions 3, 4, 5, and 6, sec. 1, title 49, U. S. C. A.; Chesapeake & O. Ry. Co. v. Westinghouse, Church, Kerr & Co., 270 U. S. 260, 265, 46 S. Ct. 220, 221, 70 L. Ed. 576; Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U. S. 247, 264, 33 S. Ct. 916, 57 L. Ed. 1472; Union Lime Co. v. Chicago & N. W. Ry. Co., 233 U. S. 211, 217, 34 S. Ct. 522, 58 L. Ed. 924; Los Angeles Switching Case, 234 U. S. 294, 310, 34 S. Ct. 814, 58 L. Ed. 1319.
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> There is no evidence that such railroads are prohibited by the plaintiffs from performing such service, nor that there are physical conditions which prevent them from doing so. Indeed, there appears to be no 'abnormal conditions' of any kind which would serve to relieve the railroads involved of the duty. Chesapeake & O. Ry. Co. v. Westinghouse, Church, Kerr & Co., supra."

Consideration of the cases[10] cited in the above holding shows more clearly than anything else could do the error into which the lower court has fallen. The Commission's main report (R. 34) refers to the fact that in *Chesapeake & Ohio Ry.* v. *Westinghouse, Church, Kerr & Co.*, 270 U. S. 260, this Court compared

> " * * the service covered by the C. &. O. tariff, with that considered in *Car Spotting Charges, supra,* and in *Downey Ship Building Corp.* v. *S. I. R. Ry. Co.*, 60 I. C. C. 543. In the *Downey case*, division 2 at page 547 defined the carrier's obligation as involving 'only one placement of a car and the movement to be made without interference and over the trackage suitable for the service.' "

As bearing out what is further stated in the main report (R. 33–35) with respect to that decision of this Court, the decision of the Supreme Court of Appeals of Virginia, 138 Va. 647, 123 S. E. 352, affirmed by this Court, clearly shows that the "spotting" there involved was direct movements of cars from the carrier's yard to the unloading points on the construction company's side tracks (123 S. E. at p. 353)

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[10] *Union Lime Co.* v. *Chic. & N. W. Ry. Co.*, 233 U. S. 211, involved the right of a common carrier by railroad to condemn land for the extension for a spur to reach a particular quarry. Although the railroad was to be relieved of the initial cost, the spur was to be owned by it as a part of its trackage, was to come into existence as a public utility and not mere private or plant track.

and, as stated by the railroad's witness (p. 354), the consignee was entitled to one placement of the car.

As for the *Los Angeles Switching Case*, 234 U. S. 294, that case is a leading authority to the effect that a question such as here involved "is a question of fact to be determined *according to the actual conditions of operation*" and "is manifestly one upon which it is the province of the Commission to pass" (p. 311). The said *Los Angeles Switching Case*, and *Warehouse Co.* v. *United States*, 283 U. S. 501, were cited in *U. S. et al.* v. *Am. Sheet & Tin Plate Co. et al.*,[11] 301 U. S. 402, 408, as authority for the statement that:

> "The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service."

That *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247, does not support the lower court's decision is apparent from the fact that it was also relied upon in *Am. Sheet & Tin Plate Co. et al.* v. *United States*, 15 F. Supp. 711, 714, which was reversed by this court in *United States* v. *Am. Tin Plate Co. et al.*, *supra*. The *Mitchell Coal Case* is principally authority to the effect that, where damages are sought by a shipper on account of preferential rates accorded

[11] These are the cases (The *Pittsburgh Allowance Cases*) above referred to, which involved the same main report of the Commission as here, the same general record, and supplemental reports as to particular industries in which the same conclusions were reached.

to its rivals, alleged to have resulted from allowances made to them, or from payments claimed to be a cover for rebating, the matter has to be preliminarily submitted to the Commission.[12] The case is also authority to the effect that "the limits of space within which delivery is due will vary with varying conditions." The Commission's main report, 209 I. C. C. 11, 17, states that "there is no dispute that delivery at the various plants is covered by the published rates"; that the difficult thing is to ascertain when delivery at the plant is made; and that no inflexible formula can furnish an answer to that question. Similarly in *N. Y. Cent. & H. R. R. Co.* v. *General Electric Co.*, 114 N. E. 115 (certiorari denied, 243 U. S. 636), wherein the question involved was also as to the duty of the carrier to perform "plant spotting" which alleged duty was claimed to supply the consideration for the railroad's agreement to pay the General Electric allowances for itself performing the spotting, it was said at p. 117:

> "* * * Since the (switching) limits embrace the defendant's plant, there is no dis-

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[12] The only phase of the case, as to which it was held that preliminary determination of the Commission was unnecessary, was in respect of the Bolivar and Latrobe mines. These companies owned no engines and the Pennsylvania hauled the cars between station and mines. As said by this Court (p. 266), the payment by the railroad to those companies of a "so-called allowance" in addition to performing the work was so plainly illegal and prohibited that it was not necessary to have any preliminary administrative determination to that effect.

pute that delivery at the plant is covered by the rate. The difficult thing is to ascertain when delivery at the plant is made.

In the nature of things no inflexible formula can furnish a solution of that problem. The limits of space within which delivery is due will vary with varying conditions. Mitchell Coal & Coke Co. v. Penn. R. R. Co., 230 U. S. 247, 263, 33 Sup. Ct. 916, 57 L. Ed. 1472. All that we can safely say is that there must be such a delivery as is customary and reasonable. * * *"

In *Elgin, J. & E. Ry.* v. *United States,* 18 F. Supp. 19, one of the cases growing out of the main Commission proceeding here involved, the opinion reads at pp. 23–24:

> "* * * In American Sheet & Tin Plate Co. et al. v. United States (D. C.) 15 F. Supp. 711, 713, decided May 23, 1936, by a three-judge court in the Western District of Pennsylvania, it was stated:
>
> > 'There appears to be no exact formula that can be applied in answering this question. The most that we can get from the decided cases is that the limits of place within which delivery is due will vary with varying conditions, and that such delivery is required, as is customary and reasonable.'
>
> In that case the court held that the spotting terminal switching service there involved was a transportation service which the railroads were by law required to perform. * * * The opinion then sets forth the following

'typical circumstances' which would relieve the carrier from the duty of spotting: '(a) Where an industry refuses to permit the railroad to enter upon the private industrial tracks; (b) Where the physical condition and layout of the private industrial tracks will not accommodate the carrier's locomotive power without hazard or *excessive delay;* (c) where the industry occupies large areas with many scattered plants, conneoted by an intricate system of industrial tracks and *used chiefly as industrial facilities.'* (Our italics.) This language clearly implies that there may be other circumstances closely analogous to the types mentioned which also might thus limit the carriers' duty. Obviously, the question propounded is one of fact which constitutes the basis for that court's rational conclusion that no exact formula can be applied in answering it.

The provisions of the act, both express and implied, convince us that it is the duty of the Commission primarily to answer this question and its answer cannot be controverted by the courts, if it is based on substantial evidence. * * *

* * * We agree with Judge Schoonmaker and his associates in the case we have discussed in the statement that the applicable decided cases hold that the limits of place within which delivery is due will vary with varying conditions, and that such delivery is required as is customary and reasonable.

While no exact formula can be applied, yet certain principles can be followed which will be both helpful and equitable as applied to all cases. We think it was within the province of the Commission under the act to promulgate and enforce the principles which they announced, as hereinbefore referred to. They seem to us to be fair, and are sufficiently flexible in their application to cover all cases, and are calculated to approximate the rights and duties of the parties involved as nearly as it is humanly possible."

And finally, as held by this Court in *United States* v. *American Sheet & Tin Plate Co. et al.*, *supra*, p. 408:

"* * * it is evident that the growth of the practice of making allowances for plant switching and the lack of uniformity in the practice of the carriers with respect to this service properly called for an investigation of the entire situation and the promulgation of appropriate orders to regulate the practice and prevent performance of a service not within the carrier's transportation obligation. * * * The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service."

1. "There is no custom or practice which has the force of a rule of law that the line-haul rate includes plant spotting service," whether at steel plants, glass plants, oil refineries, lumber, paper and box plants, composition board plants, or any others.

Despite the clear language of this Court's opinion in *United States* v. *Am. Sheet & Tin Plate Co. et al.*,

(The *Pittsburgh Cases*) *supra*, appellees apparently cling to the view that, as to plants of their kinds and the carriers serving them, there has been such universal custom to include "plant spotting" in the rate as to give the same the force of a rule of law. In their *Reply*[13] *to Appellants' Motion to Reverse* the lower courts' decrees without awaiting briefs and oral argument appellees, referring to the *Pittsburgh Cases*, state at p. 9:

> "* * * The Commission there had found and this Court stated in its opinion that the practice of the northern carriers at iron and steel plants had not been uniform and that there had been substantial differences in the treatment of individual steel plants, as regards terminal deliveries and allowances. The record before the Commission and in the courts below shows that this is not true of the southern carriers, and it is not true as to either petroleum refineries or sawmills."

What this Court said in the *Pittsburgh Cases*, *supra*, was that (p. 409–410):

> "In the case of a large industry having many points of loading and unloading throughout its plant, the usual arrangement is to have lead tracks or interchange tracks on which the cars are, in the first instance, shifted; thence they are taken over plant tracks to various buildings and points and are spotted in accordance with the needs and convenience of the industry. It is asserted by the appellees that

[13] Filed herein December 24, 1937.

it has become customary to do this spotting on plant tracks as part of the delivery service which the carrier holds itself out as agreeing to perform without a charge additional to the line-haul rate. The record fails to establish any such custom. Carriers in official territory have, for perhaps thirty years, made allowances to certain industries for doing spotting within their plants. No uniform rule as to when such an allowance would be made has been adopted although there have been efforts to agree upon a rule. Apparently the plants most favored have been steel plants and some carriers have refused to extend the system of allowances to other than steel plants. It appears from the record that the making of allowances has not been governed by any principle and the cases fall into three general classes: (1) Where the plant does its own spotting and receives an allowance; (2) where the railroad does plant spotting; (3) where the industry does its own spotting and receives no allowance.

No allowances have been granted in New England territory, in the Southeast, or in the extreme Southwest. The practice of granting allowances has spread, to some extent, from official territory across the Mississippi and to the Northwest but here again there is no uniform rule about the matter. There is no custom or practice which has the force of a rule of law that the line-haul rate includes plant spotting service."

And in *Elgin, J. & E. Ry.* v. *United States*, 18 F. Supp. 19, the Court said at page 24:

> "It is urged by plaintiffs, however, that the deliveries and the allowances therefor, which are the subject of the order, are both customary and reasonable. With respect to the custom, the record discloses that some carriers follow it and some do not; in some territories it is followed and in some it is not; with respect to some industries it is practiced by some carriers, and with respect to other industries it is not; some industries do their own plant switching, others do not; of those who do, some receive allowances therefor from the carriers, many more do not. Obviously, there was substantial evidence to support the conclusion that there was no general custom. Moreover, if any or all of the carriers, either voluntarily or by coercion, had submitted to the practice of rendering services under the guise of transportation services, which in reasonableness and in good faith could not be considered as a part of transportation, a continuation of that practice would never amount to a custom upon which the industries could claim a vested right of its continuance, for in that event the custom would be an unreasonable one, and any allowance therefor would likewise be unreasonable, nor would the custom or the lack of reasonableness and validity be aided in any way by the proposals in the tariff publications."

So far as "custom and usage" to perform plant spotting, or pay an allowance, is concerned, what was dealt with by this Court in the *Pittsburgh Allowance Cases, supra*, and by the three-judge court in the *Elgin, J. & E. Case, supra*, was what was presented by the industries concerned, namely, the *alleged* uniform custom and practice in respect of spotting (including "plant spotting"), not only of the carriers in Pennsylvania and Missouri,[13] but also in other States throughout the Union. And the Commission's main or general report, as well as its supplemental reports, were involved and made parts of the orders. Neither the language of this Court nor the language of the three-judge court, in the quotations above given, leaves room for appellees' apparent position that, from those decisions holding that there was lack of any such custom or uniformity of practice to perform plant spotting as part of the delivery or to pay allowances, there should be "sliced out" the territory served by southern carriers.[14]

It will be noted that this Court's decision in the *Pittsburgh Allowance Cases, supra*, that there was no such custom as alleged and that there was no uniformity of rule as to payment of allowances, also

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[13] Pittsburgh Plate Glass Co. Crystal City plant, Missouri.

[14] See *Los Angeles Switching Case*, 230 U. S. 294, where mention is made of the practice of carriers throughout the country to spot car on industry spurs "of the kind here in question" (p. 311) but where the distinction between such spotting and "plant spotting" is expressly referred to (pp. 307 and 310). See also *N. Y. Cent. & H. R. R. Co.* v. *General Electric*, 114 N. E. 115 at p. 119.

stated that "Apparently the plants most favored have been steel plants * * *." In the face of what is said in that opinion (p. 411) and in the Commission's report, it will hardly be urged that the reason why steel plants were the most favored was because, at such plants, spotting could be done as a direct placement or otherwise than as in conformance with the convenience of such plants. Appellee oil refining and other plants in the present cases seem to be selecting themselves, or their kinds of plants, from all other plants and urging that, as to them at least, there has been uniformity of favoritism, or, otherwise stated, that they have been the most favored of all in the matter of payment of so-called allowances. But, similarly as in the case of the steel plants and glass plants in the *Pittsburgh Cases*, the Commission's reports and the record show that the reason why the industries, appellees in these cases, are favored with allowances is not because, at such plants, spotting could be done as a direct placement or otherwise than as in strict conformance to the convenience of the plants or some other additional burden.

The distinction between spotting upon side tracks and "plant spotting" such as here involved does not rest upon the kinds of products manufactured. *Los Angeles Switching Case*, 234 U. S. 294, 310; *N. Y. Cent. & H. R. R. Co.* v. *General Electric*, 114 N. E. 115, 119; *C. & A. R. Co.* v. *U. S.*, 156 Fed. 558; *Finkbine Lumber Co. Case*, 269 Fed. 933 (certiorari

denied, 255 U. S. 574); *General Electric Case*, 14 I. C. C. 237; *Solvay Process Case*, 14 I. C. C. 514; *Industrial Railway Cases*, 29 I. C. C. 212, 230, 34 I. C. C. 596, 601; *U. S. Cast Iron Co.* v. *Director General*, 57 I. C. C. 677, 683–684. There has been a practice in the territory here involved and in other territories of performing "plant spotting" for some industries, or paying them allowances, and of not doing such plant spotting for other industries or paying them allowances. A brief statement of the start of the practice of paying allowances for "plant spotting" and its spread to certain sections of the country has been given in the opening statement. One thing that is certain is that the practice, once started as to a particular industry rapidly spreads to others.[15]

Typical of the situation in territories where allowances are granted is Ex. 150 (Or. Tr., Vol. I of Exhibits, pp. 460–47) of the Pennsylvania Railroad, introduced in evidence by Mr. Orcutt (Or. Tr., Testimony, Vol. 3, pp. 2057 and 2062), which exhibit shows 59 industries which receive allowances for performing their own spotting, *125 industries* which perform their own spotting without allowances, 18 industries where the spotting is performed in part by the railroad and in part by the industry without allowances, and 833 industries (having two or more tracks) where the railroad

[15] Ex. A–48, p. 155, Vol. 3 of Exhibits of the Original Transcript; Ex. C–22, p. 297, Vol. 4 of Exhs., Or. Tr.

does the spotting. The exhibits of other railroads show the same thing, that is, numerous industries on their lines which perform their own spotting without being paid allowances.[16] Similarly with respect to the territory involved in these cases: At the final court hearing, the returns to questionnaires in the Commission proceeding made by a number of the defendant railroads were introduced in evidence pursuant to stipulation (R. 157), that they had "been properly received and considered in evidence by the Commission." The answers to the questionnaires show the same lack of uniformity as to the performance of "plant spotting" or payment of allowances as is shown in other territories.[17]

Nevertheless, the position of appellees in these cases, similarly as in the *Pittsburgh Allowance Cases, supra*, appears to be that, as refuting their contention of long continued uniform custom of the carriers to perform spotting service within plants, or to pay allowances in lieu thereof, the record's factual show-

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[16] Erie, Exs. 82, 83, 84, 158, Vol. I of Exs. Baltimore & Ohio, Exs. 115, 122, 125, Vol. I of Exhs., Ex. 243, Vol. II of Exs., pp. 123, 134–135. Det., Toledo Shore Line, Ex. 167, Vol. I of Exs. Michigan Central, Ex. 174, Vol. I of Exs. B. & O. Chic. Term., Ex. 243, Vol. II, Exhs., p. 123. Chic., M. St. P. & P. R. R., Ex. 263, Vol. II, Exs., pp. 222, 223. Chic., R. I. & Pac. Ry., Ex. 281, Vol. II, Exs., pp. 394–399, 400–407. Chic. & N. W. R. R., Ex. 268, Vol. II, Exs., p. 290.

[17] See returns to questionnaires made by T. & N. O., L. & A., Gulf, Colo. & S. F., Missouri Pacific Lines, Tex. & Pacific, transmitted by Courts below pursuant to stipulation.

ing of absolute lack of uniformity in all territories has little to do with it, save as it is further affirmatively shown that the plants, performing their own spotting, have asked the railroads to do it for them and have been refused the service or allowances. If this position of appellees were applied, for example, to the Pennsylvania, which pays allowances to 49 industries but does not do so for 125, it would make out a strange case of uniform custom and practice. In the *Pittsburgh Allowance Cases, supra,* this Court, in answer to the contention that the Commission had by a long course of decisions sanctioned the practices, said at pp. 407–408:

> " * * * We cannot agree either that the Commission has so decided or that if it had it would be concluded from re-examining the question in the light of existing conditions. The Commission has repeatedly dealt with the matter. In numerous instances, upon application of an industry for the performance of spotting service on its plant track system, or for an allowance from the carrier for itself performing the service, the Commission, in the view that like service was performed or an allowance paid for it at other similar plants, has ordered the removal of discrimination as between shippers. On the other hand, in some cases, the Commission has held that the service demanded was not a service of transportation and has refused to order the carrier to perform it. * * * ."

As above stated by this Court, the subject matter of spotting within large industrial plants—the doing of such spotting for one plant, or payment of allowance, and the refusal to perform, or pay allowance, to another plant—has, indeed, been a prolific source of cases instituted before the Commission against the carriers. Such refusal by the carriers to some industries, while granting to others, does not indicate the long continued uniform recognition of the obligation asserted by appellees.

The Standard Oil Company of Louisiana, commencing operations in 1910, did its own spotting at its own expense until 1927 when it was granted an allowance. The history leading up to the granting of that allowance is given in the *Standard Oil Report*, 209 I. C. C. 68, 70, 71, hereinafter discussed. The allowance granted the Magnolia Petroleum Company in 1923 was the first to an oil refinery in that section of the country. It was first acceded to by the Texas & New Orleans (subsidiary of the Southern Pacific) and thereafter rapidly spread to other railroads and other plants.[18] *Magnolia Report*, 209 I. C. C. 93, 95–98. The views of Witness Tallichet, General Counsel for the Texas & New Orleans, are, therefore, of particular interest in their bearing upon the alleged uniformity of custom. Mr. Tallichet believed that the allowances paid to the Magnolia and certain other oil companies were justified, but also plainly recog-

[18] Ex. A–48, p. 155, Vol. 3 of Exhibits of the Original Transcript; Ex. C–22, p. 297, Vol. 4 of Exhs., Or. Tr.

nized the limitations upon the carrier's obligation either to perform spotting service or pay allowances. He stated, among other things, that the service for which a carrier may lawfully give an allowance must not be beyond that for which the carrier is paid in the line-haul rate; that an industry is entitled to have its cars spotted only at a reasonable place, and a carrier's obligation does not require it to discharge the duties of plant operation, that a line must be drawn between transportation service and industrial service; that a carrier is not charged with any duty to help operate a plant and the circumstances and conditions at each particular industry must of necessity govern. As to whether plant disabilities such as trackage conditions, relieve carriers from performing service within industrial plants, the witness stated: "It is a question of fact, or possibly a mixed question of fact and law, where the plant obligation begins and the carrier obligation ends, and I think it has to be settled in most instances on the facts in a particular case." (Or. Tr., Testimony Vol. 6, pp. 5519–5529, 5533, 5534.)

In this connection, too, mention is made of the rules promulgated by the carriers' committees to govern the making of allowances.[19] These rules are attached to the Commission's main report, Appendix A, and they are discussed at some length in the report itself. 209 I. C. C. 11, at pages 34 to 37. As there said, in substance, the rules for computing the

[19] Or. Tr., Vol. I of Exhs., Ex. 106, p. 297; Vol. II of Exh's. Ex. 264, p. 251.

amount of the allowance recognize that the carrier's obligation under its line-haul rate terminates where plant interferences are met with, a partial list of what constitutes such interferences being set forth. (See Rules 8, 9, 10; R. 51, 52.)

Appellees' "Reply to Appellants' Motion to Reverse" without awaiting briefs and oral argument also endeavors (p. 10 thereof) to avoid this Court's decision in the *Pittsburgh Allowance Cases, supra,* by reference to a rule [20] in the Consolidated Freight Classification, which, as stated in a footnote, is to the effect that the principal petroleum products (excepting asphalt) when moving in tank cars must not be shipped except to parties accepting delivery on private or railroad sidings equipped with facilities for piping from tank cars into permanent storage tanks. Appellees' argument seems to be that, while this Court approved the Commission's findings that, at each of the industries in the *Pittsburgh Cases*, the "plant spotting" involved an excessive service greater than that involved in team track spotting, nevertheless, no such criterion can be applied in respect of spotting, or allowances, at oil refining plants because of the above rule of the Consolidated Classification

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[20] The rule quoted by appellees apparently covers liquids other than those produced at petroleum refineries.. Sec. 8 of rule 35 of said Classification reads:

> Inflammable Liquids with flash point of 80 degrees Fahrenheit or below, in tank cars, and Combustible Liquids having a flash point lower than 200 degrees Fahrenheit, except Asphalt, in tank cars, must not be shipped, etc. (here follows the quoted portion of said rule as given in the footnote of appellees' said Reply).

and because, apparently, public team tracks are not such sidings equipped for piping to permanent storage tanks. Continuing, said Reply reads (p. 10):

> "Unlike the iron and steel traffic, therefore, there can be no question as to whether a refinery is receiving more than the equivalent of public team track service. And the orders of the Commission have the striking effect of making it unlawful to give any kind of delivery of tank carloads of petroleum at these particular refineries."

Appellees attribute a rather rigid application to the measure of "the equivalent of public team track service." (See Main report, 209 I. C. C. 11, 34–37; R. 46, 47; Rules of Carriers, R. 52.) In the *Elgin, Joliet & Eastern Case,* 18 F. Supp. 19 (dealing with this same proceeding) the Court said (p. 24) that the principles announced by the Commission

> "* * * seem to us to be fair and are sufficiently flexible in their application to cover all cases and are calculated to approximate the rights and duties of the parties involved as nearly as it is humanly possible."

As to the giving to the rule the application which appellees do, on its face such application is strained. In the first place, it will be seen that the rule speaks only of "delivery" and, while the principal production of a refinery is, doubtless, gasoline, kerosene, etc., moving in tank cars, the movements are outbound from the refinery, for example, to consignees such as dealers, distributors, "tank farms" and the like

accepting delivery on private or railroad sidings. There is a considerable variety of commodities moving inbound to an oil refinery. The report in the *Magnolia Petroleum Case* lists the principal commodities moving to and from that plant, as follows (R. 576):

> "The principal inbound commodities are sulphuric acid, fats, asbestos fibre, fullers earth, and other articles used in the refining, manufacture and shipping of petroleum and its products. Gasoline, kerosene, naphtha, lubricating oil in tank cars and in packages, light and heavy fuel oil, paraffin wax in tank cars and in box cars, greases, lump coke and briquets, sulphuric acid, scrap iron, and car wheels are shipped outbound."

Assuming, however, that shipments of crude oil and even gasoline are made to a refinery in tank cars as well as by pipe line, the plant tracks of an oil refinery with plant engines (all known as the "plant railway") are not what are commonly called private sidings; nor are they railroad sidings. Appellees mention the fact that this Court in the *Pittsburgh Allowance Cases, supra*, approved as to iron and steel plants the Commission's findings that the interchange tracks constituted reasonable points of delivery and that those plants performed no work beyond for which the railroads were compensated in their line-haul rates. Applying to those cases what are appellees' real contentions here, the interchange tracks at iron and steel plants in order to

be reasonable points of delivery, should be equipped with facilities such as trestles, chutes, and dumps for iron ore, coal and other raw materials.

Also it has to be kept in mind that, for example, the Standard Oil Company has, as a physical matter, done the work itself since 1910; and as to the safety aspects, that is the way the work should be done within that plant, namely, with engines of special design and crews experienced and trained in the handling of the products. It is not apparent that the so-called allowance received by the Standard Company since 1927 changes the situation in any way in its safety aspects.

II.

THE FINDINGS MADE BY THE COMMISSION ARE SUFFICIENT TO SUPPORT ITS ORDERS.

In the *Pittsburgh Allowance Cases, supra,* this Court said at p. 406:

> "Respecting section 6 (7) they (the appellees in those cases) say that as, by that section and section 15 (13), allowances to shippers who perform a part of the service of transportation are permissible if tariffs setting forth the nature and amount of the allowance are duly filed, as they were in the present instance, it cannot be an unlawful refund or rebate for the carriers to make the allowances which the tariffs specify. If the findings were limited to the practices specified in the sections mentioned the position of the appellees would no doubt be sound, but the Commission

has, in each case, found that the interchange tracks of the respective industries are reasonably convenient points for the receipt and delivery of interstate shipments and that the industry performs no service beyond those points of interchange for which the carrier is compensated under its interstate line-haul rates. These findings are an adjudication by the Commission that the spotting service within the appellees' plants is not transportation service which the carriers are bound to render in respect of receipt and delivery of freight. * *."

And later that opinion reads at pp. 408–409:

"* * * Since the Commission finds that the carriers' service of transportation is complete upon delivery to the industries' interchange tracks, and that spotting within the plants is not included in the service for which the line-haul rates were fixed, there is power to enjoin the performance of that additional service or the making of an allowance to the industry which performs it.

Third. What has been said makes it unnecessary further to discuss the question of the adequacy of the Commission's findings. If supported, they are sufficient to sustain the orders made."

The same findings are made in these cases; and it is enough to add that the Commission's supplemental reports and the ensuing chapters of this brief as to the individual plants show that the underlying facts are adequately and completely found.

In this connection reference is made to cases, involving the same Commission proceeding, where like findings were found adequate. *Goodman Lumber Co.* v. *U. S.*, 301 U. S. 402; *A. O. Smith* v. *U. S.*, 301 U. S. 402; *Elgin, J. & E. Ry.* v. *U. S.*, 18 Fed. Supp. 19; *Koppers Gas & Coke Co.* v. *U. S.*, 11 F. Supp. 467.

III.

THE ORDERS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

That the evidence is amply adequate to support the Commission's orders is shown in the ensuing chapters discussing the respective cases.

PAN AMERICAN PETROLEUM CORPORATION v. UNITED STATES

D. C. U. S. E. Dist. Louisiana, No. 314 Equity.

The bill of complaint in this case (R. 2) seeks to enjoin and annul the Commission's order of May 14, 1935, requiring the Yazoo & Mississippi Valley Railroad Company (a subsidiary of the Illinois Central Railroad Company) to cease and desist from paying an allowance to the Mexican Petroleum Corporation for industrial spotting at that Company's plant at Destrehan, La. (R. 52.) The appellee Pan American Petroleum Corporation is successor in ownership and operation of the refinery in question.

Switching service to and from the interchange tracks, as well as intraplant switching, for many years has been and is now performed by power owned by the Mexican Corporation.

Appellee's plant and its physical arrangement, type and location of buildings, location and number of plant tracks and spotting points, and the location and arrangement of the interchange tracks, spur tracks and main line of railroad are shown in detail on a blueprint or map introduced in evidence as A–35. (R. 354.)

The plant involved was built in 1914 and 1915 and there are within the enclosure of the plant 3.5 miles of track laid with 60 or 75 pound rail. These tracks were constructed by the Yazoo & Mississippi Valley Railroad Company for the account of the plant. (R. 242.) The main refinery area is situated on the south side of the tracks of the Y. & M. V., and about 35 large oil storage tanks are located therein. The northern portion of the plant is occupied by 17 similar storage tanks. (R. 242.)

As pointed out in the Commission's report interchange of cars between the Y. & M. V. and the Corporation takes place on two tracks located on the right-of-way of the Y. & M. V. adjacent to its main track and approximately in the center of the plant. Under normal business conditions 40 to 50 cars of outbound commodities move daily. (R. 250.) Certain types of cars are required for the loading of the various products. Those used for shipments of crude oil or asphalt, for example, cannot be used for shipments of gasoline and similar products without cleaning. The industrial trackage contains one 20° curve. (R. 243.)

Under normal business conditions the plant locomotive is operated from 14 to 16 hours a day in spotting service, as the placement of cars for loading and their removal thereafter is practically continuous and a locomotive must be available at all times. As the loading tracks can only accommodate a certain amount of cars, these cars when filled must be immediately pulled out and other cars spotted there. The spotting service must be conducted in such a manner as to provide an adequate supply of cars at such times to meet the industrial needs. If the Y. & M. V. had performed this service it would be necessary for it to assign a locomotive for exclusive use within the plant. (R. 250.) As stated by the Commission, for its own convenience the Mexican Corporation prefers to perform this service.

Hazards within the plant, as shown by the Commission's report, require the use of special spark arresters when coal for fuel is used.

It is not disputed that between 1915 and 1926 the industry performed its own spotting without allowance or request therefor. In 1926 the industry began negotiations with the carrier for an allowance, contending that at other terminals or refineries spotting service was performed by the railroads. These negotiations resulted in the carrier publishing the tariff, effective December 10, 1928, granting an allowance of 90 cents per loaded car to the industry. (R. 243, 246–7.)

After pointing out that the operation within the plant could not be successfully carried on by re-

spondents making two or even three daily switchings within the plant, and that the spotting was performed by the industry for many years without request for an allowance or for any service in lieu thereof, the Commission's ultimate conclusion was:

> We find that the interchange tracks at this plant are reasonably convenient points for the delivery and receipt of interstate shipments of carload freight; that the Mexican Corporation performs no service beyond such points of interchange for which the respondent carrier is compensated in its interstate line-haul rates; and that by the payment of an allowance respondent carrier provides the means by which the industry enjoys a preferential service not accorded to shippers generally and refunds or remits a portion of the rates or charges collect or received as compensation for the interstate transportation of property, in violation of section 6 (7) of the Interstate Commerce Act.
>
> (R. 54.)

That these findings of the Commission were amply sustained by the evidence is shown by the following:

Mr. J. E. Monroe, Assistant Traffic Manager of the Pan American Petroleum Company, at Destrehan, after depicting the operations within the plant stated that at one time his Company had given consideration to asking the carrier to perform the switching, but that the matter was dropped. He continued:

> As to the reason for dropping the matter of the carrier performing the service—I would imagine we would prefer to do it, just the general operations of the plant, etc. We have all the facilities, and we have been doing it all these years as far back as 1919, I am positive; we may have been doing it from 1914–1915 on. (R. 243.)

Mr. Monroe stated that, with respect to the Y. & M. V. locomotive that his Company put spark arresters on the stack, "because they use coal burners and we use oil burners." The witness stated that there would be a potential hazard as long as the railroad engines did not have spark arresters on them. (R. 245.) This witness stated that in order for the plan to operate as efficiently as the railroad performing the switching service, it would be necessary "to make certain changes in the operations at the plant." (R. 245.) Mr. Monroe also said:

> If the carrier were required to switch our plant we would have to change our method of handling, and I think it would be a little cumbersome.
>
> (R. 245.)

The steps taken by the industry with the carrier in negotiating the allowance are fully stated by this witness in his testimony.

Mr. F. W. Gray, Superintendent of the Pan American Petroleum Company, testified, among other things:

"When we rented a locomotive from the Y. & M. V. we had to put on a spark arrester. Our own locomotive is an oil burner, and that does away with all danger of fire. If the Illinois Central should perform the service they would have to equip their locomotives with spark arresters." (R. 250.)

Concerning the necessity for constant standby service, this witness said:

> In normal times the spotting at our plant would require constant or standby service, that is, an engine there all the time, because we run our engine as high as 14 or 16 hours. We put two crews on our engine because one crew can't handle the business. They start spotting early in the morning and work late at night. After the cars have been spotted on tracks A, B, C and D it takes about 20 to 25 minutes to load those cars. These cars are immediately pulled out and others spotted. That is practically a continuous operation. That is true at all our loading spots, so that we would need an engine there practically all the time the plant is in operation.
>
> In order for the Illinois Central to render as efficient service as we can with our own power it would be necessary for them to keep an engine there all the time working under our direction, so that there would be no delay in our industrial operations. It would have to meet the convenience of the industry.
>
> (R. 250.)

The necessity for constant standby service by the railroad's locomotive is also supported by the testi-

mony of Witness Cunningham, Train Master for the Illinois Central Railroad Company, who said:

> The Pan American plant at Destrehan has its own engine which is available at all times, and if the Illinois Central were to undertake to give that plant the same service as is now performed by the industry it would have to provide the industry with standby service. (R. 251.)

Mr. Cunningham also testified that:

> I am quite sure that the class of engines we use in that territory could not perform the switching within the plant unless the present trackage was relaid with heavier rail and a few of the curves straightened. (R. 251.)

Custom and usage.—The history of the spotting service performed by appellee at its Destrehan plant demonstrates the error of its assertion that it is a general custom of carriers to spot cars at points within industrial plants as a part of their line haul transportation, or to pay industries for that service. Here it is shown by the Commission's report that between 1915 and 1928 no allowance was paid for performance of this service. The payment of the allowance was not made or sought because of any change in either the line haul rates or any change in the nature of the service performed, but simply because the plant at Destrehan thought it was discriminated against in other railroads performing services for refineries located at other points, for

which an allowance was made or where the railroad performed the spotting service.

Taking all the evidence together, it is clear that the plant's industrial arrangement and processes were such that it was not practicable for it to utilize the usual carrier service. The carriers are under no obligation to give special service; they have no right to make any allowance for same out of the line-haul rates. The Commission, in determining what is the *usual* service, has considered the requirements of and the service accorded to *shippers generally*, and not (as appellee contends it should do) to gasoline refineries only.

We submit that the record as to the Mexican Petroleum Refinery at Destrehan amply supports the Commission's supplemental report and order.

THE CELOTEX COMPANY v. UNITED STATES.

D. C. U. S. East. D. Louisiana, No. 315, Equity.

The bill of complaint in this case (R. 55) seeks to enjoin and annul the Commission's order of July 11, 1935, requiring certain railroad companies to cease and desist from paying an allowance to the Celotex Company for industrial spotting at that Company's plant at Marrero, La. (R. 73.)

Switching service to and from the interchange tracks, as well as intraplant switching, has been performed by The Celotex Company with its own power and with its own crew since 1926. (R. 189–192.) Prior to that time the Texas and New Orleans Railroad had performed the service at the plant, which

then consisted only of the property now used for manufacturing purposes. The plant was greatly enlarged in 1926, and now consists of two sections. (R. 201.)

Appellee's plant and its physical arrangement, type and location of buildings, location and number of plant tracks and spotting points, and the location and arrangement of the interchange tracks, spur tracks and main lines of railroad are shown in detail on blueprints or maps introduced in evidence as Exhibits A–24 and A–107. (R. 353 and 438.)

These maps, together with the testimony of witnesses subsequently referred to, show that the area occupied by the Celotex Company's plant is bisected by the tracks of the Texas and New Orleans Railroad Company and the Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans. These railroads, running approximately east and west, parallel and adjoin each other. The industry uses the area north of the tracks as a storage yard for its bagasse, or sugar cane fibre, which is the principal material used in making its product. The manufacturing plant and offices are located south of the tracks. The industry, by agreement with all the railroads maintains and uses cross-over tracks between the two sections of its plant. (R. 191.) For intra-plant movement the industry uses light gondola cars, and formerly used a locomotive to move the same and also to handle carrier-owned cars, but at present uses a tractor for that purpose, and the only means by which cars can be moved across the dividing railroads

above described is by industrial power. (R. 189.) The railroads, however, have no cross-over agreement with each other and the locomotives of neither line may cross the tracks of the other. Therefore, each railroad can set out cars upon an interchange track only in one section of the plant and if shipments arrive which the industry requires in a portion of its plant not reached by the delivering line, the industry must itself take the shipments across the tracks. An allowance of $1.00 is paid upon all incoming and outgoing shipments. The plant is about 3900 feet long and 1200 feet wide. It contains about four miles of standard-gauge track owned by the industry, the mileage in the two sections being about equal. (See map, R. 353.)

The Commission found that interference with plant operations would result from the operation of locomotives of the carriers within the respective parts of the plant to which they have access. (R. 71.) The report also calls attention to the fact that since some of the shipments upon which the allowance is paid are shipments required in a portion of the plant to which the particular line-haul carrier does not have access, the allowance in such case is an assumption by the carrier of service which it could not render. (R. 72.) The Commission further finds that the industry's requirements under normal business conditions can be met only by the use of its own locomotive or other similar instrumentality operated under the direction of the industry and at its con-

venience. (R. 72.) The Commission therefore finds that the respective interchange tracks are reasonably convenient points for the receipt and delivery of carload freight, that the service for which the line-haul carriers are compensated in their line-haul rates begins and ends at the interchange tracks, that by the payment of an allowance to the Celotex Company for service performed by it beyond the interchange tracks, the industry enjoys a preferential service and receives a refund of a portion of its line-haul rates, and the order directs the cessation thereof. (R. 72.)

The plant apparently first went into operation in 1920, but was greatly enlarged in 1926. It consists of two sections, separated by the tracks of the T. & N. O. and the Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans, the lines of which parallel each other in an east-to-west direction. As stated, prior to 1926 the T. & N. O. performed the spotting service. In 1926 the Celotex Company acquired a locomotive and did its own spotting. (R. 188.) At that time communication between the two sections of the plant was established by means of a track crossing the two main lines, and over which the industry had a right to operate. The Commission found that neither carrier had the right to cross the tracks of the other, and that the only means by which cars can be transferred from one section to another is by the plant locomotive, tractor, or similar instrumentality. (R. 71.) Following this the Commission's report reads:

These are necessary facilities for carrying on the Celotex Company's industrial work and their use prevents interference with plant operations which would result by the operation of of the T. & N. O. or Terminal locomotives within the respective parts of the plant to which those carriers have access. (R. 71.)

The allowance of $1 per loaded car became effective in December, 1926, and includes payment for switching to and from the unloading and loading points in both sections of the plant, although each carrier reaches only one section of the plant and it cannot reach the other. (R. 194.)

The industrial lay-out was thus described in the Commission's report:

> In this case the industrial layout is such that neither the T. & N. O. nor the Terminal, acting for the Missouri Pacific and/or the Texas & Pacific could perform the service for which the allowance is paid. Whether any of the above carriers would be permitted to operate within the part of the plant accessible to them is not clear from the record, but it is definitely established that the Celotex Company's industrial requirements under normal business conditions can be met only by the use of its locomotive or a similar instrumentality in the manner in which the operations are now conducted.
>
> (R. 72.)

The ultimate conclusion of the Commission was:

> We find that the respective interchange tracks as described of record are reasonably

> convenient points for the delivery and receipt of carload freight; that the transportation service for which the respondent carriers are compensated in their line-haul rates begins and ends at said interchange tracks; that the service performed by the Celotex Company beyond those points is a plant service; and that by payment of an allowance to the Celotex Company for service performed beyond the interchange tracks on interstate shipments, respondent carriers provide the means by which the industry enjoys a preferential service not accorded to shippers generally, and refund or remit a portion of the rates collected or received as compensation for the transportation of property, in violation of section 6 (7) of the act.
>
> (R. 72.)

That these findings of the Commission were amply sustained by the evidence is shown by the following:

Mr. W. T. Bowker, Plant Auditor of the Celotex Company, testified among other things, that the outbound movements from November, 1930, to April 30, 1932, was 4,342 cars, and the total movement inbound and outbound was 12,456 cars. (R. 188.)

Mr. Roswell P. Pearce, Assistant to the General Superintendent of the plant at Marrero, introduced a blueprint describing the layout of the plant, and testified in great detail concerning operations within the plant. (R. 189.) In the course of his testimony Mr. Pearce said:

> The cars loaded with bagasse enter from the west and are backed in by the carrier for its

own convenience on its interchange track. Our locomotive picks up the cars loaded with bagasse from the interchange track, and crosses over the T. & P. tracks into our bagasse field, and places them on one of the six tracks previously referred to at a point where we might want them at that particular time.

(R. 190–191.)

*   *   *   *   *

With respect to traffic coming in over the Southern Pacific assigned to the bagasse plant, this carrier has no access to the north side. In other words, neither carrier can cross the tracks of the other to switch either side of our plant property. We have to perform this service under our supervision. The motive power of the Celotex Company has the right to operate, to a certain extent, over both the interchange tracks of the Southern Pacific and those of the T. & P. It is my understanding that there is some arrangement between our company and the two carriers to permit our power to cross the main lines of the railroads in getting from the north side of our property to the south side, and vice versa. Our engine crew consists of five men, namely, an engine foreman in charge of the crew, a fireman, an engineer and two switchmen.

(R. 192.)

The witness further testified in substance:

As to the reason why the Southern Pacific does not perform the spotting service at this plant, "I have my idea, but why they made the arrangement at

the beginning, I don't know definitely. There would be a conflict of work. We have so many movements to make along with the movements they could make we would be going right along behind them." It would not be practicable for the carriers to operate over the industrial tracks without interfering with the industrial operation. That is the real reason, I imagine, why the Southern Pacific and the T. & P. motive power does not enter our plant. In other words, we would have at times three switch engines working in our yard and there would be a conflict, repetition, one right after the other. While it would be physically possible for the Southern Pacific to operate over the T. & P. tracks, my understanding is, they do not have that right."

(Or. Tr. 4997–4999.)

Concerning what the allowance on the dollar paid to the Celotex Company was intended to cover, Mr. C. E. Dahlin, Traffic Manager of the Celotex Company, testified:

> The $1.00 allowance paid the Celotex Company covers the service of spotting of empties for loading and loads for unloading throughout the plant, and the return of the empties and the loads to the interchange tracks. This allowance applies to shipments over the T. & P. destined to locations on the south side of the plant reached only by the Southern Pacific. This allowance also applies to shipments over the Southern Pacific destined to our bagasse plant, on the north side, which requires a cross-over over the T. & P.

> In other words, the carriers make the Celotex Company an allowance regardless of where in the plant the cars are going.
>
> (R. 196.)

This witness also testified with respect to interference as follows:

> If we did not accept delivery of the cars on the interchange track the carriers would have to perform the service that we perform within the plant.
>
> It would be impracticable for three railroads to enter our plant and attempt to do what we ourselves could do much more economically for all concerned. There would be interference on both sides.
>
> (R. 196.)

Mr. Russell P. Watkins, Vice President and General Manager of the Texas and New Orleans Railroad Company, testified:

> The T. & N. O. pays the allowance to cover one complete switching of the plant per day, that is, to pull out the empties, bring in the loads, and place them at the places designated for loads within the confines of the plant and upon the industry's track where the industry wants the cars placed for loading or unloading. * * *. We put the cars on the interchange track, and that is delivery to the industry. We pay them $1.00 per loaded car for cars that move over our railroad, but that compensation is for service that we would perform within the factory site on our rails. The allowance includes every loaded car that comes in over our rails.
>
> (R. 201.)

Although, as above pointed out, the evidence is clear that the carrier could deliver only to one section of the plant in question and therefore could be under no legal obligation to deliver to the other section of the plant, the allowance is paid upon all shipments. An examination of the figures set out in Exhibit A–105, sheets 12, 13 and 14, indicates that the cost study upon which the $1.00 per car allowance was based includes all expenses of the operation of the intra-plant switching service. This, then, included the cost of transferring cars, of necessity set out by the industry in one section of the plant, to the other section where required by the industry. It is also clear that in paying this allowance upon such shipments, the carrier is assuming the obligation of delivering shipments into a section of the plant to which it has no access, a service which it could not be required to perform.

We submit, therefore, that taking this consideration in connection with the evidence that the industrial operations were such as to make it impossible for the carriers to render the service without being interfered with, fully justified the Commission's order requiring the cessation of the allowance.

GREAT SOUTHERN LUMBER COMPANY AND BOGALUSA PAPER COMPANY v. UNITED STATES.

In Equity No. 317.

This suit seeks to set aside the Commission's order of July 12, 1935 (R. 90) which requires the Gulf, Mobile & Northern Railway Company to cease paying an allowance to the Great Southern

Lumber Company and the Bogalusa Paper Company for spotting service within the plants of said company at Bogalusa, La.

Exhibit A–27 is a map showing the tracks of the New Orleans-Great Northern Railroad Company, and subsequently absorbed by the Gulf, Mobile & Northern. (R. 353.) The facts are set out in detail in the Commission's Twenty-seventh Supplemental Report, which shows that the Great Southern Lumber Company operates a sawmill and has control through stock ownership of the Bogalusa Paper Company, which industries together occupy a large industrial area near Bogalusa, La. The plants of the two industries above named, together with several smaller industries occupying the same industrial area, are served by about 100 individual tracks having an aggregate length of about 22 miles, all connecting with the main line of the Gulf, Mobile & Northern which parallels the lumber company's plant on the western side.[21] Practically all of the industrial tracks above referred to are laid with 56-pound rail, which is too light to permit the operation of a locomotive ordinarily used by the railroad company in its switching at Bogalusa. The New Orleans Corrugated Box Company and the Union Bag & Paper Company maintain plants located on tracks owned by the paper company. Prior to 1912 the New Orleans & Great Northern, predecessor to the Gulf, Mobile &

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[21] See *Goodman Lumber Co. Terminal Allowance*, 214 I. C. C. 84 (order upheld, 301 U. S. 402); *Finkbine Lumber Co.* v. *Gulf & S. I. R. Co.*, 269 Fed. 933 at p. 936 (Certiorari denied 255 U. S. 574).

Northern, performed all the switching service within the plant of the lumber company. About 1912, however, the lumber company took over the switching and assumed all cost thereof, which arrangement continued until April 1, 1925. The paper company began operation in 1917 and performed its own switching at its own cost, using a locomotive rented from the lumber company. About 1925, however, both the lumber company and the paper company insisted that the railroad should pay a portion of the switching cost, but made no request that it perform the service. Between April 1, 1925, and October 1, 1931, the railroad assumed part of the cost by compensating both industries for a portion of the wages of the switching crews. Between October 1, 1931, and July 26, 1935, the railroad paid a portion of the expenses of operation of the lumber company's engine, which did the intra-plant switching and the spotting for all the industries in the locality, without filing a tariff covering such allowances. On the last-named date, subsequent to the issuance of the Commission's supplemental report, the carrier filed a tariff providing for the payment of an allowance of 93 cents per loaded car. The Commission found that under the circumstances shown in evidence the transportation service which the carrier was obligated to perform under its line-haul rates begins and ends at the interchange track; that the service beyond said interchange track, a portion of the cost of which was at the time of the supplemental report being paid by the carrier, was a plant service, for the performance of which the car-

rier was not obligated under the line-haul rates, and that in paying a portion of said cost the carrier refunded and remitted a portion of its line-haul rates, and violated Section 6 (7) of the Act. (R. 90-93.)

In the lower court appellees contended that the evidence does not support the supplemental report in stating that the spotting service by the carrier in the plants under consideration would result in serious interference with plant operations, unless the operations of the carrier were carried on at the convenience of the industry rather than that of the carrier, and that the convenience and industrial needs of the industries could be met only by the use of industry locomotives.

The language of the Commission, of which the above is the substance, is an administrative conclusion of the Commission from the arrangement of the trackage system as shown by the maps and the testimony of Witness Cassidy, R. 206 et seq., and of Witness Brock, R. 210. As to interference, there is the expert testimony of Witness Brock, Assistant General Manager, Gulf, Mobile & Northern Railroad Company, who testified:

> If we were to attempt to do the work for these allied industries, with our own power, it would be inconvenient from the standpoint of the railroad, due to the fact that our yard locomotive when it is called for service within these industries, might be 5½ miles away. The industrial operations at these industries would, therefore, be delayed or neglected, in

> order to permit this engine to go back to the Great Southern Lumber Company's track. This would also delay traffic in transportation.
> (R. 210.)

Mr. Brock also testified:

> * * * The engines we now have assigned at Bogalusa could not be used to an economical advantage on the 56 pound rail within the yards of the industries, on account of the fact that the axle load on the drivers of the Russian decapod locomotives is too heavy for the size of the rail. The assignment of heavy locomotives at Bogalusa is in keeping with the general policy at other points where a great deal of switching is required.
>
> The time required for the industries at Bogalusa requires a switch engine on duty for a period of 12 hours, beginning at 7:00 A. M.; working under the Hours of Service Act.
> (R. 210.)

This witness said that his company had no other industry on its line comparable in size to the Great Southern Lumber Company and the allied industries. (R. 211.) On cross-examination Mr. Brock testified among other things as follows:

> Q. Now, in your direct testimony, you referred to some factors of saving in the operating cost to the N. O. G. N. Among them was the fact that the industry had to be served continuously within the day, as I understand it?
>
> A. That is correct, yes.

Q. That is to say the engine had to be available to spot cars whenever required to do so by the industry?

A. It should be, yes.

Q. In order to meet the convenience of the industry in its processes?

A. That is correct.

If the N. O. G. N. had to assign a locomotive to the plant to perform the service, that locomotive might have to lie idle and would have to wait upon the industrial operations at times. In order to meet the demands of all the industries that are to be served, not only within these groups, but the other outlying industries, we would find it necessary to place our own locomotives and crews in this territory, and would have to go to our shop and prepare a smaller engine—an engine that is now out of service, and place that engine in actual service. (R. 211.)

The fact that interference would be encountered between the railroad power and plant power, if the railroad undertook to perform the spotting within the plant, was a factor that was taken into consideration at the time reimbursement for the service was established. (R. 212.)

Sometime in 1911 or 1912, the Great Southern Lumber Company, at their specific request, took over the switching of their plant, assuming all of the cost, and this arrangement continued in effect until April 1, 1925, at which time the Lumber Company insisted that the respondent carriers should bear their proportion of the cost. The Boga-

lusa Paper Company began operations in 1917, and also performed its own switching at its own expense until April 1, 1925, at which time, the Paper Company also insisted that the respondent carriers should bear their proportion of the cost. * * *.

(R. 212.)

Mr. J. P. Cassidy, an employee of the industry, testified as follows:

The N. O. G. N. classifies and delivers loaded and empty cars on tracks in its south yard designated by the Lumber Company for interchange, and such cars are then moved at the convenience of the Lumber Company by its locomotive to the points of loading or unloading within the plant. We feel we are doing work that the railroad would have to do with another engine under our supervision. We do the work and in turn bill the railroad for the actual cost of operating and maintaining the switch engine.

(R. 207.)

Q. Do you know of any physical operating consideration that would prevent the power of the New Orleans Great Northern from entering upon the industrial tracks of the Great Southern Lumber Company or the Bogalusa Paper Company and doing this work?

A. The class of engines the railroad company are now using in the switching service could not operate practically over some of these tracks on account of the weight of the locomotives and the weight of the rail.

Q. Is that one reason or the principal reason why the New Orleans Great Northern has the service performed by the Great Southern Lumber Company?

A. I do not know that is the principal reason, but I do know it is one of the reasons. (R. 208.)

The service performed by the engine of the Lumber Company for the four industries is more efficient than if the N. O. G. N. performed this service with its own power in reaching the several industries. In order for the N. O. G. N. to reach the New Orleans Corrugated Box Company, and the Union Bag & Paper Company and the Bogalusa Paper Company, it would be necessary to secure trackage rights over the tracks of the Lumber Company.

(R. 208.)

Q. So that if the New Orleans Great Northern's engine entered upon those tracks it would encounter interference with your industrial engines engaged in making these shifts from one part of your plant to another part of your plant, and in the handling of the logs and so forth?

A. Yes, sir. We would have two engines belonging to two different companies, and under the supervision of two different companies operating over the same yard track.

Q. And was it to overcome this interference you entered into this arrangement to perform the service for the New Orleans Great Northern?

A. Partly so.

(R. 209.)

We submit that the above testimony clearly constitutes substantial evidence to support the Commission's conclusions.

Further, the physical characteristics of the industries' tracks are themselves evidence that carrier spotting would result in continuing and prohibitive interference. The Commission said in its supplemental report (209 I. C. C. 794) "Practically all the industrial tracks are laid with 56-pound rail, which is too light to permit the operation of the locomotives used by N. O. G. N. in switching at Bogalusa." (R. 91.) The evidence upon which the conclusion is based is the testimony of Witness Cassidy before referred to.

Appellees argued below that the testimony above is nullified by the testimony of Witness Brock, an official of the carrier, to the effect that the carrier in keeping with its general policy was using heavy engines in its switching at Bogalusa, and that these heavy engines could not operate over the 56-pound rail. Appellees argue that it would be the duty of the carrier to procure *lighter* engines. We submit that it is not the duty of the carrier to procure special equipment to serve the plaintiffs. Carriers are not required to render switching service over industry tracks unable to bear the carriers' ordinary equipment. If such obligation should exist, it might be demanded that all carriers provide themselves with narrow gauge engines, for some industries use such tracks within their plants. The attitude of the

carrier upon this point is shown by testimony before quoted.

The conclusion of the Commission that the tracks of the industry in the case now under consideration were unsafe was clearly supported by the evidence. Another factor to which the Commission gave weight was that the industrial situation found to exist required continuous service of a locomotive, rather than the "twice-a-day" service, which is a characteristic of team track or simple industrial placement. The Commission in its supplemental report said upon this point (209 I. C. C. 795):

> "The spotting for which the N. O. G. N. assumes the cost, requires 12 hours daily, except Sundays. During the first four months of 1930, 1931 and 1932, a daily average of 46 loaded cars both inbound and outbound was handled at those plants. It is clear that the N. O. G. N. cannot reasonably be required to pay the costs of operationing a locomotive 12 hours daily in handling this number of cars and that the service required is in excess of any service the respondent is obligated to perform under its line-haul rates."
>
> (R. 92.)

The evidence supports the facts stated in the above quotation.

From the evidence it is clear that the service required by the industries, and for which the carrier pays the allowance condemned, amounts to continuous service. The service for which the carrier is paying the allowance is thus shown to be service

which, if attempted by the carrier, would be under the control and at the convenience of the industries, subject to interference with plant operations, continuous, and impossible because of unsafe industry tracks. Any one of these circumstances would exonerate carrier from any obligation to perform the service. Hence, carrier's payment of allowance for the doing thereof is without consideration, voluntary, and a rebate, condemned by Section 6 of the statutes.

Concerning the argument of the superior advantage of the carrier's paying of the allowance as against its rendition of the service. This is a consideration not involved in the case. The evidence might support the hypothetical proposition that it would be better for carrier to pay the allowance than to attempt to render the service. But, as we have shown, the carrier is obligated to do neither, and hence the comparison is needless.

Upon all the facts, it would appear that the Commission's order is valid and should have been sustained by the District Court.

STANDARD OIL COMPANY OF LOUISIANA v. UNITED STATES, D. C. U. S. EAST. D. LOUISIANA, NO. 331

The bill of complaint in this case (R. 94) seeks to enjoin and annul the Commission's order of May 14, 1935, requiring the Yazoo & Mississippi Valley Railroad Company, the Louisiana & Arkansas Railway Company and the New Orleans, Texas & Mexico Railway Company to cease and desist from paying an allowance to the Standard Oil Company of

Louisiana for industrial spotting at the Company's North Baton Rouge plant (Rep. R. 107, Order R. 111).

The spotting service performed by appellee, which owns and operates five locomotives, consists of moving with those locomotives and its own crews cars between the interchange tracks of its oil refinery at North Baton Rouge, La., and the points of loading and unloading within the plant as well as intraplant switching (R. 107).

Appellee's plant and its physical arrangement, type and location of buildings, location and number of plant tracks and spotting points, and the location and arrangement of the interchange tracks, spur tracks, and main line of the railroads are shown in detail on blueprints or maps produced in evidence as A–37 and A–38 (R. 356).

The plant involved was one of the largest oil refineries in the world with more than 18 miles of standard-gauge tracks reaching several hundred loading points within the plant. In 1931, 6,285 cars loaded with freight were received and 33,111 carloads were shipped out. These figures are only about 60 per cent of those for 1929. Even a casual examination of the maps referred to would indicate to the court the extensive and complicated nature of the spotting required therein.

Evidence introduced in this record shows that a tank car was filled with gasoline or other fluid product in about 2½ hours and that the normal operation of the plant requires continual loading throughout the

working day. This in turn requires the constant presence of at least one switch engine in order to spot the cars at the loading points. (R. 108.) This is the manner in which the industry performs the spotting for itself for which the carrier pays the allowance condemned by the Commission. It is further shown (R. 109) that the spotting must be done under the control and at the convenience of the industry; that there are curves in the industry's track lay-out over which it would be dangerous for the carriers' engines to be operated and that the inflammable nature of the plaintiff's products would necessitate the installation of protective devices to prevent the emission of sparks from the carriers' locomotives if they undertook to do the spotting. (R. 109.)

It is not disputed that for many years the industry performed its own spotting without allowance or request therefor. In 1926 the Y. & M. V. was requested to do the plant's spotting, and after considerable negotiations agreed in 1927 to pay the industry an allowance in lieu of rendering the service. The N. O. T. & M. followed suit, because, as it states on page 3 of its return to the questionnaire filed by it along with the other Missouri Pacific System's subsidiaries: "The $1.20 allowance to Standard Oil Company of Louisiana, was result of cost study made by the Y. & M. V. and filed with the I. C. C. At Baton Rouge, the Y. & M. V. performs the switching service for the N. O. T. & M. from the Mississippi River ferry to industries at

Baton Rouge and North Baton Rouge, and this allowance was made by the Y. & M. V. Railroad and the L. R. & N. Railroad and *it was necessary for the N. O. T. & M. to make similar allowance in order to meet their competition.*" This return also states that the Standard Oil Company of Louisiana did not ask the answering carriers to perform the switching within the plant because of fire hazard involved from the operation of steam locomotives and electrically equipped locomotives of the rail lines. On the same page of said return to questionnaire, the carrier also states in answer to question 9 that the Standard Oil Company refused to permit entry of the respondent's power for the purpose of performing the services because of interference by respondent's power with plant operation. The impracticability of the carriers, or any one of them, doing the spotting under conditions of "team track or simple switch placement" is apparent.

Witness Cunningham, Train Master for the Illinois Central (of which the Yazoo & Mississippi Valley Railroad Company is a subsidiary) testified (R. 226): "I don't think a plant of that size [the plant involved in this suit] could be efficiently operated without an engine there all the time." He further testified (R. 227) with respect to the curvature of the industry tracks in connection with possible operation of the railroad locomotives, in case the spotting was undertaken by carrier engines, that there might be some adjustment that would be necessary there so far as the curves are concerned. The witness stated that

the type of power used in that switching territory could traverse safely a maximum curve of about 15 or 16 degrees. It appears that the industry track lay-out included some 23 or 24 degrees curves. The witness further testified (R. 227–8) that the ordinary switching crew accompanying an engine of the carrier doing spotting service would be inadequate if the carriers undertook to switch the plant in question. He stated the reason of such opinion as follows: "That is for the reason account of the curvatures, and you must take into consideration you are switching a highly explosive commodity and that certain locations in the refinery are very hazardous and if an accident should happen it could be very costly." The witness was then asked if he regarded this service in the plant, if he were called upon to do it, in excess of an ordinary team track delivery, and he replied: "I would consider the switching at this plant more than the equivalent of an ordinary spur track or team track delivery."

R. W. J. Flynn, Traffic Manager of the Standard Oil Company testified among other things:

There is no difference between the service that would be required from the carrier than that which we are performing with our own power. (R. 216.)

We have 47 loading locations or districts, within our plant and can load simultaneously at our plant 498 cars. (R. 218.)

The industrial tracks contain numerous curvatures from 7 to 25 degrees. The tracks with 25 degree curvatures are considered as impossible for railroad

engines to operate thereover in performing spotting service. If the carriers attempted to operate over these latter tracks it would be necessary to use buffers. These tracks could be changed to accommodate the railroad's power. (R. 218.)

If the two carriers, L. & A. and the Y. & M. V., should enter the plant there would be no interference with our plant operations, but if all four carriers were to attempt to perform the switching within our plant there most assuredly would be interference with our plant operations. It would be an impossible situation. As far as we are concerned the railroads could come in and do the switching, but they would have to do it under our jurisdiction while they are in the refinery area, that is, we would tell them where they were required to switch to and from, and the crew and the engine would be under our control. (R. 218.)

The railroads would have to spot the tracks at our convenience; not interpreting "convenience" to mean our arbitrary wish, but in the interest of efficient operation. (R. 219.)

W. W. Cunningham, Trainmaster, Illinois Central Railroad Company, testified among other things:

If the Illinois Central were required to switch the plant it would be necessary to assign one or more engines there at all times. I don't think a plant of that size could be efficiently operated without an engine there all the time. (R. 226.)

In order for us to enter upon the plant tracks and perform the spotting service it would be necessary to straighten out some of the curves. With the type

of power that we are using in that switching territory, about a 15 or 16 degree curve is the maximum that we can negotiate. Of course, there are some points in that switching territory where the degree of curvature is such that we can only operate thereover by holding onto the cars. (R. 227.)

I consider it very impractical for both railroads to serve the plant at the same time, both from an operating standpoint and interference. (R. 227.)

The answers filed by our company to the Commission's questionnaire, and made a part of this record, show that the Standard Oil Company declined to permit Missouri Pacific power access to its plant.

Plant requirements, convenience and interference.—The operation of appellee's plant is fully explained in the Commission's report. It is there shown that after delivery on the interchange tracks the cars are classified as to size or lading, to suit the convenience of the industry, and are then moved by industrial locomotives to the point of loading or unloading, or to storage tracks (R. 108). The report points out that there are numerous sharp curves over which large locomotives could not operate, and one track where the use of buffer cars are necessary on account of the curvature. (R. 108.) The report also points out that the classification and movement of the cars beyond interchange tracks being under the direction and control of the industry, an efficient and orderly operation results. The fire hazards attendant upon the ordinary use of the steam locomotive at a refinery plant are referred to, and the statement made

that because of such conditions the normal switching crew must be increased by one additional member. This and much other evidence in the voluminous record fully warrant the conclusions stated in the Commission's report (R. 109–110) that

> * * * Any operation not under plant management and control would be impracticable and would not be permitted by the industry. All of the above conditions exist at present as they did at the time the respondents refused to perform the spotting.
>
> The manner in which the operations of this plant are conducted, and the hazards attendant upon them, in conjunction with the size of the industry and the complexity of the trackage layout, prevent the performance of any service by the connecting respondents beyond the present points of interchange unless conducted strictly for the convenience of the industry and under its direction and control. * * * carriers have complied with their obligations under the interstate line-haul rates by the delivery and receipt of carload freight on the interchange tracks described of record; that the service beyond the interchange tracks is a plant service; and that by the payment of an allowance to the industry for service performed by it beyond the interchange tracks on interstate shipments, respondents provide the means by which the industry enjoys a preferential service not accorded to shippers generally, and refund or remit a portion of the rates or charges collected or received as compensation for the transportation

of property, in violation of section 6 (7) of the act.

Custom and usage.—The history of the spotting service performed by appellee at its North Baton Rouge plant demonstrates the error of its assertion that it is a general custom of carriers to spot cars at points within industrial plants as part of their line-haul transportation duty, or to pay industries for performing that service. Here, it is shown by the report, that the railroads never performed a service for appellee between 1910 and August, 1927, at which time the carriers commenced paying the industry for performing the service. Payment of the allowance was not because of any change in either the line-haul rates or of any change in the nature of the service performed, the Commission stating (R. 109) that "The industry desired no change in the method of doing the work, but claimed that by custom and because allowances were made to other industries, including Standard Oil companies in other sections of the country, it was entitled to have respondents perform its spotting service or pay an allowance therefor." (R. 109.)

HUMBLE OIL & REFINING COMPANY v. UNITED STATES

This suit seeks to set aside the Commission's order of July 8, 1935 (and the accompanying Thirteenth Supplemental Report, 209 I. C. C. 727), which requires the Texas & New Orleans Railroad Company and the Missouri Pacific Railroad Company to cease paying allowances to the Humble Oil & Refining

Company for industry spotting at Baytown, Texas. (R. 543.)

Exhibit A–92 is a map showing the arrangement of tracks and structures making up appellee's plant. This map, together with the testimony of the witnesses to be named, shows that as stated in the Commission's supplemental report, the industry occupies a large area upon which its petroleum refining plant, with numerous storage tanks and loading racks, is located. The entire plant contains about eight miles of standard-gauge industry tracks, consisting of between 30 and 40 individual tracks upon which an average carload traffic to and from the plant amounts to about 32,000 cars per year. The details of the plant track arrangements are set out at length in the supplemental report. Construction of the plant began in 1919 and extended over three or four years. During construction the requirements of the plant were supplied by very light weight locomotives owned by the industry, and later the industry procured and used for all of its spotting and intraplant movement two heavy locomotives. The industry locomotives have been doing the industry service ever since. Prior to May, 1926, the Dayton-Goose Creek Railway Company was the only line-haul carrier reaching the plant. That company was owned almost entirely by the President of the industry who, effective May 1, 1926, sold it to the Texas & New Orleans. Prior to this sale the industry did its own spotting and intraplant switching without requesting any carrier for an allowance. In 1927 the Missouri Pacific, through a

branch line operated by electric power known as the Houston-North Shore Railroad, made connection with the industry tracks. The interchange tracks with the Texas & New Orleans are located upon the railroad's property near the southeastern corner of the main refinery area. The Missouri Pacific maintains two sidings, each about three-fourths of a mile in length, located about a mile north of the industry's main refinery area. These sidings are used as the principal points of interchange between the two railroads and the industry, although there are some secondary industry tracks of comparatively small capacity at other parts of the plant. (R. 544–5.)

Within the plant there are 42 locations where cars are spotted for loading and unloading. These locations have a capacity of from 1 to 50 cars. The spotting locations are from 2,000 to 15,000 feet from the Missouri Pacific's interchange, and from 1 to 2 miles from the Texas & New Orleans interchange yard. It is stated in the evidence that plant practices require some of the spotting locations to be switched several times a day during times of normal business. (R. 545.) There are six spotting locations at the industry's docks located about a mile south of the main refinery area. These docks are connected with the main plant trackage system by an industrial track which is used extensively in the performance of intraplant service by the company's locomotives. The evidence is that the plant's industry practices are such that there would be serious interference between intraplant shipments from refinery to the docks and

locomotives of the two railroads named if carriers undertook to do the spotting.

The Commission in its supplemental report states that under circumstances existing at the plant, the obligation of the carriers under their line-haul rates extends no further than delivery and receipt upon the interchange tracks which are found (209 I. C. C. 730) to be reasonably convenient points for the delivery and receipt of carload freight; that the industry performs no service beyond the interchange for which the carriers are compensated in their interstate line-haul rates; that by the payment of the allowance in question by the carriers, the industry enjoys a preferential service in excess of that accorded to shippers generally, and that the carriers in paying said allowance refund and remit a portion of the line-haul rates in violation of Section 6 (7) of the Interstate Commerce Act. (R. 545–6.)

The Commission's supplemental report states as characteristics of the plant in question and the general situation as to service (1) that the Missouri Pacific could not operate within the plant with the electric power used by it in its line haul to the plant; (2) that the industrial operations require that some of the spotting locations be switched several times per day; (3) that carrier spotting would have to be at the convenience of the industry and not of the carriers; (4) that the switching would have to be done under the control of the industry; (5) that switching by carriers would be seriously interfered with by industrial methods and processes, and

(6) that carrier switching would so interfere with industry movement and operations that it would not be permitted by the industry. (R. 544–545.)

All these underlying findings of the substantive facts (set out on page 729 of 209 I. C. C.) are amply supported by evidence. Under the principles stated by the Commission in its general report, the existence of such conditions relieves the carriers of all duty with regard to spotting cars within the plant.

The statements as to necessity for the spotting to be under the control and at the convenience of the industry, and the probability of interference between carrier spotting and industry movement and practices, would find sufficient support in the layout of the elaborate system of tracks disclosed by the plan of the plant, Exhibit A–92 above referred to. The Commission could have given a sound analysis of the terminal problems which would arise—merely from inspection of the map and the full description of the operations as described by the witnesses.

These statements supporting the substantive findings of the Commission in its supplemental report are too numerous to be quoted in full, but we call the Court's attention to the following:

Witness Shirley, Yard Master of the industry for 12 years, after describing in great detail the manner in which the switching in the plant was conducted, stated (R. 323) that when a car of a certain size was wanted, it was wanted at once and that, as industry yard master, he had to go get it "right now" and spot it, showing clearly that the industry requires,

and is now getting at the carrier's expense, spotting of a character much more expensive and elaborate than the ordinary two switches per day given by the carriers in ordinary team track or simple switch placement. The same witness gave testimony showing clearly that the intra-plant movements would interfere with the carriers' spotting. He said (R. 324) that they could not have the Missouri Pacific push all their deliveries in on the industry tracks because

> "It would block me going to the docks.
>
> Q. Well, if the Missouri Pacific were to switch your plant, do I understand then that you would require that, in spotting your plant, you would insist upon the Missouri Pacific bringing it through your present interchange to the various spots within your plant?
>
> A. That would be up to them; they are switching it.
>
> Q. I understand you to say they could not bring it in any other way because it would block the plant?
>
> A. Yes, sir, so long as I am doing the switching, if I were doing the switching."
>
> (R. 324.)

On page 324 of the record the witness was asked concerning a certain movement assumed to be done by the Missouri Pacific in the event it undertook to do the industry spotting:

> * * * "If the Missouri Pacific should undertake to perform that service, it would

interfere with our getting to the docks, because the head end of our yard comes out on our main line.

(R. 324.)

On page 325 the witness testified:

> "One reason why we would not desire the Missouri Pacific to operate i our plant is because that carrier operates an electric line to Baytown and we would not desire an electric locomotive in our plant because of fire hazard."

The witness then testified that the Missouri Pacific operated an electric line to Baytown, but stated that he did not know of any reason why they could not operate a steam engine in the plant. (R. 325.)

Witness Davis, an executive of the plaintiff company, testified at length (R. 325 et seq.) concerning the history of the company, the manner in which it has done its spotting in the past and the procedure followed in securing the allowance in question. This witness was very positive that an electric locomotive, the kind used by the Missouri Pacific on its line to the plant could not be used to do the plant spotting. He testified (R. 326):

> "Mr. Jones: You would not permit the electric power in there?
>
> Mr. Davis: No, sir, that would be impossible because many of our racks have pipes from the ground with an overhead spout through which the oil is loaded into the dome of the tank car and naturally there would be an interference with the overhead trolley

wires; we have cranes with electric booms moving over those tracks, sometimes; we could not afford to take the wires down each time we wanted to use them, but there is no reason why any railroad using normal power, any steam railroad, can not come in to the plant and operate it, and, so long as it does not increase our switching costs, we have no objection to the carrier performing the service. Our natural desire is to operate the plant as economically as possible, whether we operate it or they are doing the service."

On page 327 the same witness testified:

"We have crude oil loading racks loading 600 to 800 cars a day and requiring 6 to 8 switches a day. There is nothing that forces the carriers to give us that service except their desire for additional tonnage. That same operation would be all right at Baytown."

As a side light which illustrates the manner in which allowances have been secured throughout the country, and particularly at the industry in question, Witness Davis testified (R. 329) that the Missouri Pacific "merely filed tariffs to meet the competition of the Southern Pacific." On page 329 Mr. Davis further testified that the statement in the Missouri Pacific's answer to the questionnaire, introduced in evidence at the final hearing of this case, to the effect that the Humble Company refused to allow that company to enter the plant, was made because of the industry's position relative to electric locomo-

tives and that the industry made no objection to steam power entering the plant. (R. 329.)

Witness David, an official of the Missouri Pacific System, testified (R. 329–330) that his company could not operate the Baytown yard with regular road engines even though the line to Baytown were a steam line; that they would have to assign a switch engine. The attitude of the industry with respect to the carrier's obligation to do spotting service is illustrated by the next question asked by Mr. Davis, representing the industry at the hearing before the examiner. He said (R. 330):

> * * * "The reason we cannot switch the Humble Oil & Refining plant is purely our own disability."

Director Bartel than asked (R. 330):

> "Q. Why wouldn't you switch it with a steam engine?
>
> A. Too much work.
>
> Q. Would you say this would be the equivalent of team tracks switching?
>
> A. No, sir, not for the number of cars.
>
> Q. Do I understand from that if you were called upon to switch this plant that you would not regard the service as in excess of simple team track service?
>
> A. It might be a little in excess. If we had 42 team tracks and an average of 4 loads for each one per day and we had 42 industry tracks with an average of 4 loads a day, the performance would be practically the same."
>
> (R. 330.)

The questionnaire of the Missouri Pacific, introduced in evidence at the hearing, states, on sheets 2–3, that the allowance to the Humble Oil & Refining Company having been established by the Texas & New Orleans, was made by the other lines in order to meet competition and was not the result of any cost study conducted by the company.

MAGNOLIA PETROLEUM COMPANY CASE.

D. C. U. S. Southern Texas, No. 691 Equity (R. 563–590).

This suit seeks to set aside the Commission's order of May 14, 1935 (and the accompanying Tenth Supplemental Report, 209 I. C. C. 93), which requires the Kansas City Southern Railway Company and the Texas & New Orleans Railway Company to cease paying allowances to the Magnolia Petroleum Company for industry spotting at Chaison, Texas. (Report, R. 574; Order, R. 579.)

Description of plant and operations.—This industry, which operates an oil refinery at the above-named station, occupies an area of about 1200 acres enclosed within a fence. The greater portion of the area is occupied by oil storage tanks, the main refinery area comprising about 80 acres. There are about ten miles of standard-gauge railway track made up of more than 40 tracks, mainly laid with 75 to 90-pound rail. A comparatively short length of track laid with 56-pound rail is used only for intra-plant switching. The Texas & New Orleans and the Kansas City Southern connect with the indus-

try tracks. (See Map, Ex. A72, R. 396–7.) The principal inbound commodities are sulphuric acid, fats, asbestos fibre, fuller's earth and other articles used in the refining, manufacturing and shipping of petroleum products. The outgoing shipments are made up of gasoline, kerosene, naptha, lubricating oil, in tank cars, in packages, fuel oil, paraffin wax, greases, lump coke, briquets, sulphuric acid and scrap iron.

Spotting of cars.—The history of this industry's switching and spotting methods is briefly as follows: The company acquired the plant prior to 1914 and began operating with one locomotive, but later purchased another. These locomotives were utilized in work incidental to construction and later in intra-plant switching and spotting service. At the beginning of operations, some of the spotting service was done by the line-haul carriers, but as the plant enlarged the carriers stopped doing the spotting and merely delivered and received cars to and from the industry on certain interchange tracks within the industry. In 1921 the volume of business of the industry greatly increased, with the consequent increase in the switching required, and it decided that it was performing spotting service which should probably be done by the line-haul carriers. At this time the Texas & New Orleans handled about 75 percent of the industry traffic and it was with this road that negotiations for assumption by the railroads of the spotting service were begun. After some negotiations and preliminary survey of the switching by

the Texas & New Orleans, that line agreed to compensate the industry for the spotting service rather than to assume the duty of doing it. Effective May 25, 1923, the Texas & New Orleans began the payment of an allowance of 72 cents per car to the Magnolia Company for spotting and the industry thereupon advised the Kansas City Southern by letter suggesting a similar arrangement with that company. Competition between the two companies for the industry's business prompted an immediate compliance by the Kansas City Southern with the industry's suggestion of making the allowance, and the Vice President of the railroad advised the industry by long distance telephone of his company's willingness to make an allowance equal to that of the Texas & New Orleans. This was the first allowance granted to an oil company in that section of the country. The action of the railroads with respect to the Magnolia's request for allowance resulted in immediate application of other companies in the vicinity for similar allowances. See: Return of Texas & New Orleans R. Co. to Commission's questionnaire of January 14, 1932, (Original Exhibit); returns of Kansas City Southern R. Co. (Original Exhibit) and Texarkana & Fort Smith Ry. Co. (Original Exhibit);[22] testimony of Witnesses Reed (R. 269); Tallichet, (R. 274); Hurst (R. 279); Maddox (R. 283); Meeks (R. 264 and 297); Deramus (R. 331); Weaver (R. 343); Hamilton (R. 347); Johnston (R. 349).

[22] Transmitted by lower court pursuant to stipulation.

The Commission proceeding.—The Commission in its supplemental report found that the interchange tracks at the industry were constructed primarily for its convenience in the receipt and delivery of carload shipments; that its industrial practices necessitated the control and direction by it of locomotives doing the spotting within the plant; that the method of spotting cars employed by the industry could not be performed by carriers unless the locomotives engaged worked under the direction and control of the industry, and that by long custom and practice the interchange tracks at the industry have been used as the point where cars destined to or received from the industry are delivered or taken up by the line-haul carriers. Upon these facts the Commission found that the interchange tracks were reasonably convenient points for delivery and receipt of carload freight; that under conditions existing within the plant the carriers were obligated to do no more than take their cars to and from the interchange tracks; that the allowance paid by the line-haul carriers was for a service which under the line-haul rates the carriers were not obligated to perform, and that by the payment of the allowance in question the carriers in fact refunded and remitted to the shipper a portion of the charges received for compensation for interstate transportation of property, in violation of section 6 (7) of the Interstate Commerce Act. Pursuant to said supplemental report the order above outlined was issued.

As in other cases heard herewith, the plaintiff contends that the record contains insufficient evidence to support the conclusions that the interchange tracks at the Magnolia plant are reasonably convenient points for the delivery and receipt of carload freight, that the line-haul rates do not cover industry spotting and that the payment of the allowance to the industry violates section 6 (7) of the Interstate Commerce Act.

As we have already pointed out the aforesaid findings are conclusions which the Commission is authorized to make upon a study of the conditions and circumstances prevailing at the plant.

The President of the Kansas City Southern Railway Company testified, in substance, that there is "*some doubt as to the extent of the service that we are obligated to perform in many instances, because conditions are so different at the different industries.*" (R. 350-352.)

It is true that the witness expressed the opinion that carriers were obligated to do the spotting in the plant of the Magnolia Company and in several other named plants. But if the carriers' obligation is based upon the "merits" of each situation, the final weighing of those merits and the determination of the obligation must rest with the Commission. If the officials of the carriers reach the conclusion that the "merits" of an industry do *not* entitle it to the service or an allowance in lieu thereof, the industry may apply to the Commission for a review of its merits and pray an order requiring the carriers to

render the service or pay a money substitute. There have been many such proceedings. The Commission has the same power to review the "merits" of a particular industry when the carriers have concluded that its merits *do* justify an allowance.

Competition.—Witness Weaver, Vice President in charge of traffic for the Kansas City Southern, testified, when asked whether it was for reason of economy or to meet competition that his line agreed to make the allowance to the Magnolia Company: "Well, both. We naturally wanted to meet the competition of the Southern Pacific, and also the other [economy] appealed to us." (Or. Tr. 6147.) The same witness makes it clear that the matter of competition was the prime consideration. That this competition was keen is shown by the circumstance of the Kansas City Southern's officials calling the Magnolia officials by long distance telephone to offer an allowance equal to that of the Texas & New Orleans immediately upon learning of the rival railroad's action (R. 343–349).

Clearly the Commission's findings in this case are sufficient in law and, being supported by substantial evidence, afford a legal basis for the Commission's order.

The order in this case should be sustained.

THE FIRST TEXAS COMPANY CASE

No. 692—Equity: D. C. U. S. Southern Texas (R. 590).

This suit seeks to set aside the Commission's order of July 11, 1935 (and the accompanying Twenty-

Fourth Supplemental report, 209 I. C. C. 767) which require the Texas & New Orleans Railroad Company, the Missouri Pacific Railroad Company, the Gulf, Colorado & Santa Fe Railway Company, the Missouri-Kansas-Texas Railroad Company, and the Burlington, Rock Island Railroad Company to cease paying allowances to the Texas Company for industry spotting at the Texas Company's petroleum refinery at Houston, Texas. (Report, R. 605; Order R. 608.)

Description of plant and operations. Exhibit A-80 is a map showing the arrangment of tracks and structures making up the plaintiff's plant. (Facing R. 404.) This map, together with the testimony of witnesses (Witnesses: Ervin, Or. Tr. 5752–62 R. 301; Fleming, Or. Tr. 5763–74 R. 314; recalled 5801 R. 321; Meeks, Or. Tr. 5774–86 R. 264; Drake, Or. Tr. 5787–88 R. 305; Coon, Or. Tr. 5789–91 R. 329; Davis, Or. Tr. 5791–94 R. 325; Talichet, Or. Tr. 5794–98 274, 311; Hershey, Or. Tr. 5798–99 R. 313; James, Or. Tr. 5800 R. 314) shows that as stated in the Commission's supplemental report, this industry occupies a large area near Houston, Texas, and maintains thereon numerous buildings and apparatus for the refining of crude petroleum. The carriers have tracks adjacent to the property which connect with the tracks of the Texas Company within the plant. The Texas Company owns 17 tracks having an aggregate length of about 22,500 feet. Upon these tracks there are about 15 spotting locations within the plant.

Spotting of cars.—The Texas Company has owned this refinery since 1928, previous to which time it was operated by another company. In 1923, the previous owner applied to the Texas & New Orleans for a switching allowance, and upon investigation it was ascertained that the cost to the industry of doing the spotting was about 65 cents per loaded car and an allowance of that amount was granted by the Texas & New Orleans late in that year. Subsequently, in March 1925, upon a further cost investigation, the allowance was increased to 90 cents a car. The Texas Company began operating the plant in 1929, after it had been shut down for more than a year. The industry performed part of its switching, the rest being done by the Texas & New Orleans, between the time the plant resumed operations and December 8, 1929, upon which date the Texas & New Orleans began the payment of an allowance of 90 cents per loaded car to the Texas Company. Subsequently, the tracks of the Port Terminal Railroad Association, a joint facility of all the carriers above named, were connected with the plant. The Texas Company refused to permit the Port Terminal locomotives to do the spotting within the plant, whereupon the Port Terminal granted the same allowance as that already established by the Texas & New Orleans. The track lay-out within the plant is comparatively simple, and the construction of the tracks is such that the locomotives of the carriers named could safely operate over them.

The Commission's supplemental report finds, in substance, that the spotting required at the plant in question, and for which the carriers pay the allowance, is in excess of team track or simple switch placement because: (1) The industry obtains from its own locomotives, at the expense of the carriers, a service superior to that which the carriers could be required to give it, in that the switching service normally accorded by carriers involves only one placement of a car, whereas the industry is shown to receive much more than one placement; (2) the spotting operations within the plant are carried on, not at the convenience of the carrier, but to suit the convenience of the industry; (3) the carrier spotting would be subject to interference by plant operations; and (4) the industry refused to permit the Port Terminal locomotives to operate within the plant.

Upon these facts the Commission found that the transportation service which the carriers were obligated to perform for the industry under the line-haul rates or the switching charges of the Port Terminal begins and ends at the interchange tracks, which are reasonably convenient; that the service performed by the industry within its plant beyond said industry tracks is a plant service which is not the duty of the carriers to perform; and that by the payment of the allowance for such service beyond the interchange tracks, the carriers provide means by which the Texas Company enjoys a preferential service not accorded to shippers generally, and re-

funds and remits a portion of its line-haul rates. The order attacked directs the carriers to cease and desist from the practices named.

Evidence supporting the Commission's substantive findings of fact and its conclusions thereon is to be found in the detailed map of the plant in question, and in the testimony concerning the history of the allowance, and the manner in which the spotting is conducted.

Witness Drake testified (Or. Tr. 5635, R. 305):

> "Q. Do you know why you do not go into the Texas plant?
>
> A. They do not desire us in there.
>
> Q. They do not desire you to do so?
>
> A. They do not.
>
> Q. All the rest of them [other refineries permit you to enter?
>
> A. Yes, sir."

The same witness testified (Or. Tr. 5640, R. 306):

> "Q. You say the Texas Company prefers to do its own spotting? Do you know what that is based on?
>
> A. Well, yes, it was considered advantageous to them to have an engine available at all hours of the day.
>
> Q. Couldn't you put an engine out at their service the same as at the Sinclair?
>
> A. No, sir, not with that volume of business; we would not undertake to hold an engine there for a little intra-plant work. * * *"

On cross examination Witness Drake testified (Or. Tr. 5641, R. 307):

> "Q. Now, have you at any time offered to perform the switching service for The Texas Company or have they ever refused to permit you to perform the switching service within their plant?
>
> A. Knowing that we were going to take the line over for operation, I called on the Superintendent of The Texas Company and asked him if it would be satisfactory for us to serve the plant, and he then informed me that they preferred to do the work themselves."

In a later portion of his testimony this witness, it is true, admitted that he was not an executive of his company and had no specific authority to deal with the Texas Company or its officers. His testimony, however, constitutes substantial evidence of what all the evidence taken together indicates, to wit, that the Texas Company was unwilling to have the carriers do the plant spotting.

The return of the Gulf, Colorado & Santa Fe Railway Company to the Commission's questionnaire, introduced in evidence at the final hearing (Original exhibit transmitted pursuant to stipulation R. 157) states that the company made the allowance to the Texas Company "based upon a similar amount paid to them by our competitor." Said return also states "The Texas Company, at Houston, Texas, elected to perform this service with its own power and so notified the carrier serving that plant. The matter of allowance was the subject of negotiations for some

time prior to the effective date, December, 1929, of the allowance of 90 cents per car."

On page 5638 of the Original Transcript (R. 305–6), Witness Drake testified that spotting is performed under the direction of a yardmaster of the industry. At page 5642 of the Original Transcript, (R. 307) it appears that the tracks "would have to be fixed up" before carrier engines could do the spotting in the plant with their present customary engines; and that a certain amount of maintenance would be necessary to make the trackage safe for carrier equipment. Witness Drake testified (Or. Tr. 5651, R. 309) that the operation of a locomotive in a refinery where there is a likelihood of explosions is more hazardous than in other industries. It requires a constant watching by the railroad to see that the fire boxes are not leaking, the locomotive burners are in good shape and that no violent couplings are made which would cause sparks. Government regulations relative to precautions to be taken tend to minimize the hazard, not to remove it.

The Commission's findings set out in its supplemental report are clearly sufficient and the evidence amply supports the report and order.

Plaintiff's suit should be dismissed for want of equity.

THE GULF REFINING COMPANY CASE

D. C. U. S. Southern Texas, No. 693 Equity (R. 629).

This suit seeks to set aside the Commission's order of July 11, 1935 (and the accompanying Twenty-

First Supplemental Report, 209 I. C. C. 756), which requires the Texas & New Orleans Railroad Company and the Kansas City Southern Railway Company to cease paying an allowance to the Gulf Refining Company for industry spotting at the company's petroleum refinery at Port Arthur, Texas. (Report, R. 641; Order, R. 645.)

Description of plant and operation.—The detailed arrangement of tracks and the structures and apparatus making up the plaintiff's plant are shown on maps. (Exhibits A–46 and Or. Tr. 152 to 160 of Volume 3 of Exhibits, R. Opp. 393 and 440.) These maps, together with the testimony of the witnesses (Witnesses: Jones, Or. Tr. 5422 R. 252; Franklin, Or. Tr. 5441 R. 258; Beck, Or. Tr. 5452 R. 259; Meeks, Or. Tr. 5479 R. 264; Deramus, Or. Tr. 6094; R. 331.) show that as stated in the Commission's supplemental report, the main refinery section of this industry occupies an area nearly two miles long by a mile in width near Port Arthur, Texas. About one-half mile to the southwest is another section of the plant containing docks, warehouses, car shops and machinery shops. Throughout the plant as a whole, there are about 50 industrial tracks having an aggregate length of about 13 miles and extending to about 35 widely scattered locations at which the industry requires the spotting of cars for loading and unloading. Some of these locations have room for the spotting of several cars at one time. There are included 15 or 20 locations where box cars are loaded and unloaded and 7 different racks for the loading of

tank cars. One gasoline loading rack has room for 18 tank cars, and during normal production it is necessary to place and remove cars at this rack as often as 4 times per day.

The tracks of the Kansas City Southern (formerly the Texarkana & Ft. Smith Railway Co.) and the Texas & New Orleans extend to the plant. There are adjacent to the point where the respective tracks of these companies reach the industry extensive sidings which are used as interchange tracks between the railroads and the industry. The arrangement is stated more in detail in the supplemental report. Each of the carriers has direct access only to a portion of the plant and in order to reach certain other portions would have to use or cross over the tracks of the other railroad. The industry can go from one part of its plant to certain others only by crossing or using tracks belonging to one or both of the carriers.

Spotting of cars.—From the time the industry began operations until 1919 (during which period the plant was much less extensive than at present), the carriers performed plant spotting. In February of 1919, the industry purchased a locomotive with which it did necessary construction and intra-plant switching and also some of the spotting. In November, 1922, a second locomotive was purchased and was used as above stated. The Kansas City Southern continued to do some switching service at the plant with its line-haul locomotives until March, 1924, at some times devoting as much as four locomotive hours per day. During the same period and until the allow-

ance was granted in April, 1924, the Texas & New Orleans maintained a switching locomotive at the Gulf Company's plant which performed spotting service for the industry. During this period it appears that both carriers and the industry each performed a portion of the spotting and also a portion of the intra-plant switching. The carriers made no charge for the operation of the intra-plant switching they did and the industry made no charge for the portion of the spotting its locomotives did.

Upon the inception of the allowance to the Magnolia Petroleum Company (which is the subject of an order of the Commission attacked in one of the suits submitted jointly with the instant case), the Kansas City Southern wrote to the industry and offered to grant the "same concession." After some correspondence the industry and the two carriers serving it conducted a cost study over a ten-day period beginning November 5, 1923, from which it appeared that the theoretical cost to the Kansas City Southern of doing the spotting of the cars, of which it had the line haul, would be $1.038 each, and to the Texas & New Orleans 93 cents.

After negotiation, the carriers agreed to pay an allowance of 90 cents per loaded car, which became effective by tariff publication by each of the two companies about April 1, 1924. The Commission in its supplemental report states as its conclusion from the circumstances shown in evidence, that the allowance was granted by the carriers to this indus-

try largely for competitive reasons and with little, if any, consideration as to whether or not there was any legal obligation upon them to render the spotting service under the line-haul rates. When both the carriers and the industry were all participating in the movement of cars within the plant without serious interference, the plant was considerably smaller than at present; but as the plant was enlarged the industry for its own convenience undertook to perform the service beyond the interchange tracks because after the enlargement of the plant the situation became such that interference would result from an attempt by the carriers to do the spotting at the same time the industry carried on its normal intra-plant movement. The Commission found that in order for the carriers to perform the spotting service for which they paid the allowance in question, each of them would have to assign a locomotive to the plant, and the service would have to be performed practically under the complete direction and control of the industry. It further found that the carriers are not obligated under their line-haul rates to perform spotting service within a plant, or beyond a point of interchange reasonably convenient under the circumstances, under the direction and control of an industry. The Commission found that by the payment of the allowance the carriers caused the industry to receive the equivalent of a substantially greater service than it had received prior to the granting of the allowance, although the line-haul rates remained the same, and

points out that the effect of this is in effect equivalent to a reduction in the line-haul rates and that a shipper enjoying such constructive reduction enjoyed a preferential treatment in comparison with shippers generally. The concluding findings were that service beyond the interchange tracks is a service primarily for the benefit of the plant—a service for which the carriers are not compensated in their line-haul rates; that said compensated line-haul service begins and ends at the interchange tracks; and that by the paying of the allowance, the carriers refund and remit a portion of their line-haul rates, in violation of Section 6 (7) of the Interstate Commerce Act.

The order which plaintiff seeks to have the Court set aside directs the carriers to cease and desist from the payment of the allowance which the Commission, as above stated, has found to be violative of the statute.

Most important are Exhibits A-46 and (Original Transcript, Volume 3 of Exhibits, pp. 152 and 326; R. 393 and 440) which show in detail the elaborate layout of tracks, buildings and apparatus which make up the plant of the plaintiff. The operations within this plant are explained in detail by operating men of the industry (Witnesses Jones, Franklin and Beck, whose testimony covers from pages 5422 to 5452 of the Original Transcript, R. 252–263), and officials of the railroad (Witnesses Meeks and Reed, Or. Tr. 5479 to 5503, R. 264–274). These maps and testimony put before the Commission a complete picture

of the plant and its operations with respect to the receipt and forwarding of carload freight. The testimony includes, it is true, certain conclusions and opinions of the witnesses as experts, to the greater part of which the Commission gave no weight.

It is, of course, impossible to state here all the facts shown by the maps of the plant and the testimony. We will refer, however, to portions of the testimony which warrant the Commission in making some of the statements of substantive fact set out in its report.

With respect to how much consideration was given to the legal obligation of the carriers to do the spotting here under consideration, as compared with the factor of competition between the various railroads, Witness Beck, Assistant General Traffic Manager of the Gulf Refining Company, testified (Or. Tr. 5453–54, R. 261) that the Kansas City Southern in May, 1923, offered to make an allowance to the industry. The latter had filed no definite application, but its executives had negotiated with the said carrier about a year before. This witness further testified with regard to the granting of the allowance:

> "Q. Was it based on their granting an allowance to your competitors?
>
> A. That was one of the considerations." (Or. Tr. 5454.)

The attention of the witness was then called to Exhibit A–48, (printed in the Original Transcript at page 155 of Volume 3 of Exhibits, R. 393) wherein Mr. Holden, the Vice President of the Kansas City Southern Railway, under date of April 30, 1923,

wrote to the then traffic manager of the Gulf Refining Company, stating that he had "just learned that Southern Pacific Company has negotiated with Magnolia Petroleum Company at Chaison, Texas, whereby Southern Pacific Company will allow Magnolia Petroleum Company an allowance per loaded car for all carload traffic handled to or received from Magnolia Petroleum Company interchanged just outside of the plant of the Magnolia Petroleum Company. * * * We feel that we will be compelled to meet the action of Southern Pacific Company at Chaison and will want to treat your company equally as well as we do Magnolia Petroleum Company although the service might not be exactly the same in both instances, * * *." The witness did not attempt to explain the writer's basing the Kansas City Southern's offer of an allowance solely upon competition.

Mr. Holden of the Kansas City Southern, under date of February 13, 1924, wrote the Gulf Company another letter (printed in the Original Transcript as Exhibit A-50, page 158 of Volume 3 of Exhibits, R. 396) wherein it is shown that the amount of the allowance to the Gulf Company was to be determined largely by reference to the amount allowed the Magnolia Company, with little consideration given to the ten-day check of the cost of spotting which the witnesses now say was the basis upon which the amount of the allowance was fixed. In said last named letter the following language appears:

"I think you will agree with me also that it would be undesirable for our company to attempt to perform this work within your plant as it would undoubtedly interfere with your own work, * * *."

It thus appears that the Vice President of the Kansas City Southern was of the same opinion as that expressed by the Commission upon the subject of interference between carrier spotting and intra-plant operations.

Taking the evidence as a whole, it seems very clear that the attitude of the industry was that spotting by the carrier would have to be under the complete direction and control of the industry. Otherwise the movement of cars by the carriers to the docks within the plant could not be free and unrestricted, since certain mechanical situations require the release of pressure upon certain lines because of fire hazard before cars can be moved over the tracks. (See Or. Tr. 5429.)

Witness Beck (Or. Tr. 5471, R. 263) was asked, "As a matter of fact, because of the nature of the industry, the carriers, for their own protection, and also for the protection of the company, had to observe certain rules and regulations pertaining to hazards, fire hazards, and matters of that kind—isn't that true?" To which he answered, "Yes, that is true." The witness further testified (Or. Tr. 5472, R. 263) that for a carrier to do the spotting within the plant would necessitate its compliance with rules similar or the same as those prescribed by the Inter-

state Commerce Commission in the pamphlet of its Bureau of Explosives. It is the position of the Commission that a carrier is not obligated to do spotting under such exceptional conditions or to expose its equipment and employees to such hazards.

It is shown (Or. Tr. 5485) that for carrier's locomotives to do the plant spotting, it would be necessary for them to be operated under the detailed supervision of the industry yard foreman.

The evidence further indicates that the industry now enjoys and is paid for service of a much higher degree than is involved in team track or simple switch placement. (See testimony of the Industry's yardmaster, Or. Tr. 5427, R. 252.)

Witness Meeks testified that two "spots" daily would not be adequate for the plant's needs. (Or. Tr. 5483, R. 265.)

The extent of the carriers' obligation in particular cases has long been a matter of dispute between shippers and carriers, and the Commission has many times been required to decide such questions. From the beginning, other considerations, such as interference, denial of carrier convenience, industry, control, excessive service required, in addition to physical accessibility, have been held to be factors in the delimitation of carriers' duties by the Commission.

Spotting such as that enjoyed by this industry at the carriers' expense is not universal, even in the larger industries, and it is a matter of common knowledge that the ordinary shipper requires and receives only team track or simple industry place-

ment. This the Commission has taken as the standard of the carrier's obligation, since that is what is required by the majority of shippers.

Because the interchange tracks may not be suitable places for the loading or unloading of cars, it cannot be said that they may not be held to be points at which the shipper is required to take delivery. If under the situation created at a particular plant by the industry the carrier cannot "spot" the cars with a service equivalent to team track or simple switch placement, the carrier may reasonably make delivery at the interchange tracks, notwithstanding the fact that the commodities cannot be unloaded there.

In allowance tariff schedules, carriers make unilateral promises to pay allowances to named shippers. While carriers should notify the Commission of all allowances, whether or not they are legal, such schedules providing for allowances are not tariffs in the generally accepted sense of the term. A tariff expresses the terms of a carrier's *offer to everyone.* It proposes to carry, for a specified charge, *any goods* offered by *any one.* The supplemental allowance tariffs upon which the industries involved in these cases rely, are schedules wherein a carrier offers to "spot" cars within a plant or render any other service *for a particular shipper.* The allowance tariff of itself is of no force or effect. Under the typical tariff there is an obligation to do the service named for *all* shippers who bring themselves within prescribed conditions. Therefore, the test of the effectiveness of the separate allowance tariff is

whether the line-haul tariff obligates the carrier to do the spotting under the conditions existing at plaintiff's plant.

The facts set out in the Commission's report are fully supported by the evidence and the findings are sufficient to support the order.

The plaintiff's suit should be dismissed for want of equity.

THE SECOND TEXAS COMPANY CASE

(U. S. D. C. S. D. of Texas, No. 718 Equity) (Port Arthur Plants) (R. 657)

This suit seeks to set aside the Commission's order of January 15, 1936 (and the accompanying Forty-Fourth Supplemental Report, 213 I. C. C. 583), which requires the Texas & New Orleans Railway Company and the Kansas City Southern Railway Company to cease paying allowances to the Texas Company for industry spotting at that company's three plants, known, respectively, as the Asphalt Plant, the Island Plant and the Refinery, located at or in the vicinity of Port Arthur, Texas. (Report, R. 665; Order, R. 672.)

Description of plants and operations.—As shown in the evidence and pointed out by the Commission's Forty-Fourth Supplemental Report, the Texas Company maintains at and in the vicinity of Port Arthur, Texas, three plants, an asphalt plant at Port Neches on the Neches River about midway between Beaumont and Port Arthur, Texas, a refinery known as the Island Plant near Port Arthur, and a plant known as the Refinery at Port Arthur. The Com-

mission in its supplemental report discusses separately the transportation situation at each plant. The evidence upon which the Commission bases its supplemental report is the following: Exhibits A–79, A–81, A–82, A–84, A–85, A–86 (Or. Tr., Vol. 3 of Ex., pp. 219–227; R. 405–408); Exhibits A–117, A–118, A–119 (Or. Tr. Vol. 3 of Ex. pp. 328–333; R. 441–443); returns of carriers to questionnaires (Orignals transmitted pursuant to stipulation R. 157); testimony of Witnesses Nicholson (Or. Tr. 5726–33, R. 314), Snyder, (Or. Tr. 5745–52, R. 315), Ervin (Or. Tr. 5752–62, R. 317), Fleming (Or. Tr. 5763–74, R. 318), Deramus (Or. Tr. 6092–6138, R. 331), Weaver (Or. Tr. 6138–6154, R. 343), Hamilton (Or. Tr. 6154, R. 347), Johnson (Or. Tr. 6160, R. 349.)

With respect to the situation at the Asphalt Plant, the Kansas City Southern is the only carrier serving that plant. That carrier owns a delivery track located just west of the plant, from which the industry engine moves the cars to points of loading and unloading within the plant and for which service the carrier has been paying an allowance of $1 per loaded car since March, 1924. There are 64 points of loading and unloading within the plant to which cars are moved as required by the plant's needs. The track layout, as shown by the map, Exhibit A–79 (R. 405) is quite complicated, there being a number of ladder tracks, as well as other tracks, scattered throughout the plant. Some of these tracks have a curvature ranging from nearly 11 degrees to more than 44 degrees. Curves from the

lead to the ladder tracks are either 28 degrees or 44 degrees 8 minutes, and in many cases it is necessary, in order to reach the points of loading and unloading, to pass over these ladder tracks. (See Ex. A-79, R. 405.) Testimony given by one employee of the company is contradicted by that of another employee, upon the question of whether, prior to the granting of the allowance in 1924, the industry was doing all of its spotting. Witness Nicholson (R. 314-315) testified that he was Chief Clerk of the Port Neches plant and was familiar with the switching operations there and that the connecting carrier had not during his time at Port Neches, to his knowledge, done the spotting. He testified that in 1932 he had been connected with the Texas Company about 20 years and had been located at Port Neches about 12 years. This would make his testimony mean that since 1920 the Kansas City Southern had not done the spotting. The other witness, Mr. Fleming, who had been connected with the railroad traffic department of the Texas Company during the 14 years preceding his testimony in 1932, but who is not shown ever to have been located at Port Neches or in the vicinity, testified (R. 320) that at all times prior to the granting of the allowance the carrier and the industry did the spotting at the Asphalt Plant jointly. The railroad officials gave evidence intended chiefly to support their contention that the amount of the allowance paid was less than the spotting would have cost if it had been done by the carrier. They accepted or assumed it to be their obligation to do

the spotting, largely upon the precedent set up by the carriers in regard to the Magnolia refinery. The Commission came to the conclusion that because of the complicated layout it would be practically impossible for the carrier to use an ordinary locomotive, but that it would be necessary to supply a locomotive of a special design in order to negotiate the curves that would be encountered on the industry's system of tracks. Further, that such engine would have to be available practically at all times in order to comply with the needs of the plant. (213 I. C. C., l. c. 585, R. 667.)

As to the Island Plant the Kansas City Southern is the only line reaching the plant. It delivers carload shipments to the plant on a series of tracks north of the plant. From these tracks the plant locomotive moves the cars to the various points of loading and unloading within the plant, about 30 in number. The industry's system is made up of nearly two miles of track. (See Ex. A-81, R. 405.) Cars are taken from the interchange track and spotted wherever it is convenient for the plant to handle them, for which service the carrier pays the industry an allowance of 90 cents per loaded car. Employees of the industry testified that if the carrier were to perform the service, the industry would expect the same service as it was now receiving from its own power. A test was made over an eight-day period in December, 1923, to determine the cost of the spotting as performed by the industry, and out of a total of 90 engine hours the engine was idle at intervals which aggregate over 41½

hours, which time was charged to the industry. The manner in which the spotting is done and the industrial operations carried on would necessitate the assignment of an engine to the plant and its operation at the convenience of, and subject to the control of, the industry.

With respect to the Refinery, both the Kansas City Southern and the Texas & New Orleans have access to the plant. There are 78 separate tracks scattered throughout the plant upon which cars are spotted for either loading or unloading, although most of the spotting is upon about ten of these tracks. The track layout is such that delivery of cars from either carrier to certain spotting locations within the plant would require a considerable back-haul or reverse movement, comparatively few tracks being reached by direct movement from either carrier's line. The map of the industry system shows some severe curves that would have to be negotiated. (See Ex. A-82, R. 405.) In order for carriers to render the spotting service, it would have to be done upon a schedule, making allowance for intra-plant movements of the industry and, in effect, requiring the spotting operations to be at the plant's convenience and need. A cost study covering ten days in December, 1923, resulted in a showing that the cost of handling both loaded and empty cars between the interchange tracks of the carriers and the points of loading and unloading averaged $1.168 per car. The engines were shown to have been idle at intervals aggregating several hours per day. By agreement

between the carriers and the industry, an allowance of 90 cents per loaded car was fixed, and covered by allowance tariffs effective March 31, 1924.

In its report the Commission points out that while some of the carriers' officials took the position that prior to the granting of the allowance the carriers were doing some of the spotting within the three plants above described, the President of the Kansas City Southern wrote to the Chairman of his road's executive committee that the practice of paying allowances would put "quite a burden upon the railroads as it means similar action at all the refineries we serve in the Beaumont-Port Arthur district." The letter in question would seem to confirm the correctness of Witness Nicholson's testimony above referred to, which is to the effect that between 1920 and the establishment of the allowance early in 1924, the carriers were doing no interplant spotting whatever in the three industries involved.

The Commission further points out that the granting of the allowances involved in the instant case was based upon competitive reasons arising from the grant by the Texas & New Orleans to the Magnolia Petroleum Company.

Upon the basis of the principles announced by the Commission in its main report and applying the same to the circumstances and situations found to exist at the three plants under consideration, the Commission found that the transportation which the carriers are obligated to perform in the instances described under their line-haul or switching rates

begins and ends at the interchange tracks, which are found to be reasonably convenient points for the receipt and delivery of carload freight under the circumstances; that the services performed by the industry within its plants, for which the allowances are paid, are plant services which it is not the duty of the carriers to perform; wherefore the Commission concluded that by the payment of the allowances in question the carriers provide a means by which the industry enjoys a preferential service not accorded to shippers generally, and refunds or remits a portion of the rates or charges collected or received as compensation for transportation of property, in violation of section 6 (7) of the act.

In conclusion, we submit that the substantive facts set out in the Forty-Fourth Supplemental Report afford ample ground for the Commission's order, in view of the general principles stated in the main report. We further submit that the conclusions of the Commission are such as it is entitled to draw from the physical conditions and industrial practices shown by the maps of the various industries and the description of operations therein found in the testimony of the witnesses.

We submit that the Commission's order should be sustained and this suit dismissed.

CONCLUSION

The decision of the District Court should be reversed, the injunctions ordered dissolved, and the petitions dismissed.

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APPENDIX

Pertinent provisions of the Interstate Commerce Act are:

Section 1, subdivision 3, provides:

> (3) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

Section 6, subdivisions 1 and 7, reads:

SEC. 6. [*Amended March 2, 1889, June 29, 1906, June 18, 1910, August 24, 1912, August 29, 1916, February 28, 1920, and August 9, 1935.*] [*U. S. Code, title 49, sec. 6.*] (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers

or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

(7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Section 12 (1) of the Act provides:

SEC. 12. [*As amended March 2, 1889, February 10, 1891, February 28, 1920, and August 9, 1935.*] [*U. S. Code, title 49, sec. 12.*] (1) That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this part, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common car-

riers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this part; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this part and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this part the Commission shall have power to require by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

The provisions of Section 13, subdivisions 1 and 2, are:

SEC. 13. [*As amended June 18, 1910, February 28, 1920, and August 9, 1935.*] [*U. S. Code, title 49, sec. 13.*] (1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall

briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(2) Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this part, or concerning which any question may arise under any of the provisions of this part, or relating to the enforcement of any of the provisions of this part. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this part, in-

cluding the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Section 15, subdivisions 1, 13, and 14, read as follows:

SEC. 15. [*As amended June 29, 1906, June 18, 1910, February 28, 1920, March 4, 1927, June 19, 1934, and August 9, 1935.*] [*U. S. Code, title 49, sec 15.*] (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a

through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(13) If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

(14) The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this part.

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